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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1561

CHULA VISTA ELECTRIC COMPANY, a corporation,

Appellant,

vs.

STATE BOARD OF EQUALIZATION,

Appellee.

JURISDICTIONAL STATEMENT

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Appellee.

ON APPEAL FROM THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

JURISDICTIONAL STATEMENT

Pursuant to rules 13(2) of the Rules of the Supreme Court of the State of California, appellant files this statement of the bases upon which it is contended that the Supreme Court of the United States has jurisdiction to review the final judgment entered by the Court of Appeal of the State of California in this case, and that the court should exercise such jurisdiction in this case.

OPINION BELOW

The Opinion of the Court of Appeal of the State of California appears in Appendix E hereto and is reported in the Advance Sheet of 35 Cal. App. 3d page 445, dated December 26, 1975 and the Minute Order of the California Supreme Court

denying the Petition for Hearing appears in the Advance Sheets of 15 Cal.3d No. 5 dated January 28 at page 8 thereof.

SUBSTANTIALITY OF THE FEDERAL QUESTION

This Appeal presents important and substantial questions involving the principals and scheme of taxation by which the State of California has exacted and is continuing to exact literally millions of dollars in taxes illegally and unconstitutionally from the United States Government and from the government contractors who deal with the United States.

Decided by this Honorable Court on April 19, 1975 in the case of Diamond National Corporation, Appellant v. State Board of Equalization consolidated with Crocker-Citizens National Bank, Appellant v. State Board of Equalization, Appellee, consolidated in Case No. 75-1038, on appeal from the California Court of Appeal, 48 U.S. Law Week ___ was the issue that the California sales tax is a vendee (purchaser) tax, i.e., that the legal incidence of such tax falls upon the vendee that a sales tax exacted from a vendor who sells to the United States Government or one of its instrumentalities is unconstitutional as the legal incidence of the tax is really on the United States Government. There is also now pending on appeal in the U.S. Court of Appeals for the Ninth Circuit Case No. 74-3360 entitled United States of America, Plaintiff-Appelee v. State Board of Equalization (State of California), Defendant-Appellant, involving a similar question as presented in this appeal.

STATEMENT OF THE CASE

Appellant, Chula Vista Electric Company, , a California corporation, is an electrical contractor and conducts a general electrical contracting business. Appellant contracted with the United States Government to sell and install on a government installation electrical cable to replace existing worn cable.

Appellant pursuant to said contract purchased such cable pursuant to a valid resale certificate for resale to the United States Government and sold to and installed such cable on the U.S. Government facility. The State Board of Equalization assessed appellant a sales or use tax based upon appellant's acquisition cost of the cable.

Appellant paid said tax and thereafter brought suit for a refund of the taxes. The Court of Appeal upheld the tax upon appellant upon the authority of §6384, Revenue & Taxation Code (Appendix A, p. 1) and §1615 of Title 18 of Calif. Administrative Code (Appendix A, p. 6). Appellant contends for the reasons hereafter stated that Rev. & Tax. Code §6384 and §1615 of Title 18 is unconstitutional and unconstitutionally applied to appellant and refund of the amount paid pursuant to said assessment should be made.

Effective April 1, 1976, Regulation 1521 of Title 18 of the California Administrative Code was amended to incorporate the discriminatory regulations

contained in Regulation 1615 of said Title 18, and said Regulation 1615 was repealed. A certificate copy of such amended regulations is attached hereto as Appendix G.

GROUNDS OF JURISDICTION OF SUPREME COURT

This Appeal arises from a final judgment made and entered by the California Court of Appeal on December 3, 1975 (Appendix E). There was a minor modification made to the Opinion on December 30, 1975 (Appendix F) on a denial of a petition for rehearing by appellant. The California Supreme Court denied Appellant's petition for hearing on January 28, 1976 (Appendix D). A Notice of Appeal on behalf of Appellant was filed on April 15, 1976 in the Court of Appeal (Appendix D). The jurisdiction of the court is invoked under the provisions of Title 18 United States Code Section 1257(2).

The constitutionality of Revenue and Taxation Section 6384 and Section 1615 of Title 18 of California Administrative Code as unconstitutionally discriminating against persons doing business with the United States Government was raised by Appellant in its trial brief (Appendix B).

The California Court of Appeal in the instant case affirmed the constitutionality of Revenue and Taxation Code §6384 where it stated:

> "Section 6384 represents an effort to extend the tax base to the maximum degree constitutionally permissible in light of restrictions upon direct state taxation of the United States and its instrumentalities." (Appendix E, p. 9.)

It is also respectfully requested that if this honorable court should determine that certiorari is the proper mode of review, that this appeal under 28 United States Code Section 2103 be regarded as a petition for Writ of Certiorari.

DISCUSSION

THE TAX IMPOSED BY CALIFORNIA WITH RESPECT TO CONTRACTORS DOING BUSINESS WITH THE UNITED STATES GOVERNMENT, UNDER REVENUE AND TAXATION CODE SECTION 6384 VIOLATES THE FEDERAL GOVERNMENT'S CONSTITUTIONAL IMMUNITY FROM STATE TAXATION.

The constitutional immunity of the federal government from state taxation is well settled on the Supreme Court authority since the decision in McCulloch v. Maryland, 4 Wheat 316, 4 L.Ed. 579 (1819). In United States v. Allegheny County, 222 U.S. 174, 176 (1944) the Supreme Court states:

> ". . . since 1819 when Chief Justice Marshall in the McCulloch case expounded the principle that properties, functions, instrumentalities of the federal government are immune from taxation by its constituted parts, this Court never has departed from that

> basic doctrine or waived in any application. The reaches of that constitutional immunity particularly in so far as it protects persons who deal with the United States, have expanded and contracted over the years. But unshaken, rarely questioned . . . is the principle that possessions, institutions and activities of the federal government itself in the absence of express congressional consent are not subject to any form of state taxation." (Id. page 177.)

See also Kern-Limerick, Inc. v. Scurlock, 347 U.S. 110 at 117-118, 122, 74 Supreme Ct. 403, 98 L.Ed. 546.

Section 107 of Title 4 of United States Code (Buck Act) has been recently held by the Supreme Court to be "an explicit congressional preservation of federal immunity from state sales taxes unconstitutional under the immunity doctrine announced by Chief Justice Marshall in McCulloch v. Maryland." United States v. State Tax Commission of the State of Mississippi, 95 Advance Supreme Ct. Reporter 1872, 1880, 43 U.S. Law Week 4681 (Supreme Ct. June 2nd, 1975).

If, therefore, the California sales tax operates as a vendee tax on the United States, it is constitutionally invalid.

Where the question is whether the state tax affects federal immunity, the interpretation of

the state taxing statute becomes a federal question and the impact of that tax becomes a matter of federal rather than state determination. First Agricultural National Bank of Berkshire County v. State Tax Commission, 392 U.S. 339, 88 Supreme Ct. 2173, 20 L.Ed.2d 1138 (1968) and Kern-Limerick, Inc. v. Scurlock, supra.

The essential inquiry in determining whether a state federal tax violates federal immunity is: on whom does the legal incidence of the tax fall. First Agricultural National Bank v. State Tax Commission, supra.

It is clear that if the legal incidence of the tax falls on the United States as a vendee (purchaser) rather than the vendor (retailer) then a tax on sales of such transaction is unconstitutional. United States v. Nevada Tax Commission, 439 Fed.2d 435, 439 (Cal. 9, 1971), United States v. State Tax Commission of the State of Mississippi, supra, First Agricultural National Bank v. State Tax Commission, supra.

On April 19, 1976, this honorable Court in the case of Diamond National Corporation, Appellant v. State Board of Equalization decided the issue that the California sales tax is a tax on the vendee (purchaser) and reversed the California Court of Appeals' decision which had upheld a sales tax upon Diamond National Corporation who had sold tangible personal property to a tax exempt instrumentality of the United States Government, i.e., a national bank. This honorable Court having decided that the incidence of the sales tax falls upon the purchaser,

the instant case appears to be on all fours with the Diamond National Corporation case (supra) and United States v. Nevada Tax Commission case (supra). In both those cases a tax exacted upon the vendor of tangible personal property to the United States Government or its instrumentalities was voided. In the instant case the exaction of a tax upon the Appellant herein as a vendor (retailer) to the United States Government as a customer (purchaser) is unconstitutional, as the legal incidence of the tax falls upon the United States Government.

Appellant submits that the intent of Revenue and Taxation Code Section 6384 was not to impose a use tax upon contractors doing business with the United States Government, but was an attempt to exert a sales tax upon those contractors. Revenue and Taxation Code Section 6384 is found in chapter 4 of Part 1 Division 2 of the Revenue and Taxation Code entitled "exemptions" where it appears under Article 2 of that chapter 4 entitled "Exemptions From Sales Tax." Revenue and Taxation Code 6384 is therefore found in the section that deals with exemptions from sales tax and is intended to be a limitation on the exemption from sales tax. (NB: The language in Revenue and Taxation 6384 "the tax imposed under this part," (this part having reference to the headings of Article 2 entitled "Exemptions From Sales Tax.") Further buttressing this position is the reference and the note under Revenue and Taxation Code 6384 to Section 6007.5 of the California Revenue and Taxation Code (Appendix A). Revenue and Taxation Code 6007.5 specifically uses language

of retail sales and imposes a gross receipts tax on the sale or sales of the property.

It is therefore submitted that Revenue and Taxation Code 6384 as it purports to be a tax on a retail sale on sales to the United States Government is not constitutional for the reasons previously stated in the argument that the sales tax is a vendee tax and that the United States Government is immune from such taxation.

IF THE IMPORT OF REVENUE AND TAXATION CODE 6384 AND SECTION 1615 OF TITLE 18 OF CALIFORNIA ADMINISTRATIVE CODE IS TO IMPOSE A USE TAX WITH RESPECT TO CONTRACTORS DEALING WITH THE UNITED STATES BUT NOT WITH RESPECT TO CONTRACTOR DEALING WITH OTHERS, IT UNCONSTITUTIONALLY DISCRIMINATES AGAINST THE UNITED STATES AND ITS CONTRACTORS.

Assuming, arguendo, that Revenue and Taxation Code Section 6384 is not a sales tax taxing statute but is designed together with section 1615 of Title 18 to be a use tax taxing statute, the imposition of the use tax with respect to government contractors dealing with the United States unconstitutionally discriminates against the United States and contractors dealing with it.

California Court of Appeal concluded and held in affirming the trial court's decision, that the cable in question sold by Appellant and installed on the property owned or leased by United States Government was tangible personal property, i.e., a fixture and not machinery and equipment and subject to tax under the Revenue and Taxation Code 6384.

The Court of Appeal in its opinion on page 6 states:

> "If the cable installed by taxpayer is necessary to the transmission line and so firmly attached to the structure to become a part of it, the cable is then a fixture within the meaning of Title 18, Section 1615 of the Administrative Code."

The sale and installation of a fixture in real property has for many years been treated by the California Courts as a sale of tangible personal property subject to the sales tax. In Honeywell, Inc. v. State Board of Equalization, 48 Cal.App. 30, 97 (122 Cal.Rptr. 237) the Court stated:

> "For over 40 years it has been the law of California that when the manufacturer of tangible personal property sells such property at retail such sale is subject to sales tax even though such manufacturer may also install such tangible personal property in real property, when such tangible personal

property may be properly classified as 'fixtures.' When a manufacturer of a fixture contracts to sell and install the fixture, the problem is not a legal problem of taxability, it is merely an accounting problem to determine what portion of the total contract price is attributable to the tangible personal property (fixture) and what portion is attributable to the labor and services of installing it. If a retail merchant sells a portable air conditioner which is clearly subject to sales tax, such sale does not become nontaxable merely because the merchant delivers it to his customer's home and 'plugs it' into the electrical outlet to make certain that it operates. But Honeywell in effect argues that this analogy is not accurate because in the case at bar all of its 'control devices' became a part of the realty and were not 'fixtures.' Board and the trial court, based on substantial evidence, found otherwise. . . . What Honeywell is actually doing is questioning the validity of the Board's basic approach of distinguishing between fixtures and materials which are incorporated in and become part of the real property. . . ."

The discriminatory effect of Revenue and Taxation Code 6384 and Section 1615 of Title 18 of the Administrative Code is apparent in that in the Honeywell case involving Section 1521 of Title 18 of Administrative Code, the taxpayer

there was attempting to avoid the imposition of a sales tax on the sale of its component parts of an air conditioning system by contending that those parts were not a sale of fixtures but parts used in improving real property and that the fabrication labor and overhead attributable to those parts would not be taxable as a sale to a customer. The Court stated:

> "Actually, the ultimate question which this Court is confronted with is whether or not 'control devices' (as defined in finding 5) are 'tangible personal property in the hands of Honeywell' and 'sold by Honeywell (at retail) for use by the purchaser' so that 'sales price' devised from such sales should be included in Honeywell's gross receipts for purposes of computing the sales tax which Honeywell owes as a retail seller."

On the foregoing it is apparent that California is taking the inconsistent po sition that transactions involving sale and installation of fixtures by contractors to other than the United States Government are characterized as a sale and subject to the California sales tax as a sale at retail by the contractor to the purchaser, i.e., consumer, but it becomes a nonsale or a use by the contractor subject to the California use tax if the transaction involve the sale and installation of the identical fixture by a contractor to the federal government and hence taxable to the contractor as an ultimate consumer and user of the fixture.

The rule is well settled that "a sales tax may not discriminate against the government or those with whom it deals." Phillips Co. v. Dumas School District, 361 U.S. 376, 80 Supreme Ct. 474, 4 L.Ed.2d 384. See also United States v. City of Detroit, 355 U.S. 466, 473 (1958); Moses Lake Homes, Inc. v. Grant County, 365 U.S. 744, 81 Supreme Ct. 870, 6 L.Ed.2d 66. It is also equally clear in this case that California's imposition of its use tax with respect to government contractors does so disciminate.

The sales tax and the use tax are separate, but complimentary taxes provided for by the California Revenue and Taxation Code, Sections 6001, et seq. Douglas Aircraft v. Johnson, 13 Cal.App.2d 545, 90 Pac.2d 572 (1939). Generally, where sales are concerned, California imposes its sales tax on all sales made in the state, and follows up with its use tax on the use of property in the state, which for some reason has escaped the sales tax (e.g. property purchased and brought in from another state). Section 6051. Accordingly, Section 6401 exempts from the use tax, property which was subject to the sales tax. The purpose of the use tax is not to be used as an avoidance of constitutional limitations of taxation upon the United States Government or discriminate against persons doing business with the United States Government but as stated in Chicago Bridge and Iron Co. v. Johnson (1941) 19 Cal.2d 162, 165, 119 Pac.2d 945, 947:

> "One of these purposes is to make the coverage of the tax complete to the end

that the retail sales tax . . . will not result in an unfair burden being placed upon the local retailer engaged solely in intra state commerce as compared with the case where the property is purchased for use or storage in California and is used and stored in this state. The two taxes are complimentary to each other with the aim of placing the local retailers and their out-of-state competitors on an equal footing." (Emphasis added.)

See also Brandtjen and Kluge v. Fincher (1941) 44 Cal.App.2d Sub. 939, 941-942, 111 Pac.2d 979. See also Union Oil Co. of California v. State Board of Equalization, 60 Cal.App.2d 441, 34 Cal.Rptr. 872, 386 Pac.2d 496.

California has developed a scheme of taxation relating to the imposition of sales and use tax that compels a construction contractor selling fixtures to be used in making improvements to real property for the United States Government to include in his costs and thereby pay to the State of California a use tax on the wholesale acquisition cost of the items of personal property so sold to the United States Government. (Revenue and Taxation Code 6384, Title 18 Section 1615 of the California Administrative Code.) However, if the same work is performed for the State of California, a political subdivision thereof or for any other person, firm or corporation, the sale to the installer would be a sale for resale exempt from the imposition of sales tax and thereafter a sale by

the contractor (installer) at retail to the ultimate purchaser of the installation would be a retail sale and therefore subject to the imposition of the California sales tax. (Section 1521 Title 18, Appendix A.) Because such a retail sales tax would be prohibited where the retail sale was to the United States Government, the State of California by reason of Revenue and Taxation Code 6384, and Title 18 of California Administrative Code Section 1615 (Appendix A) classifies as a terminal use by a contractor dealing with the United States Government, items which are classified and treated as a retail sale by the government contractor at retail when the installation is for someone other than the United States Government (Title 18 Section 1521, Appendix A). By this method, the State of California has collected tax on sales to United States Government amounting to substantial amounts of money because the contractor, is compelled by this scheme of taxation to add the amount of the use tax to the sale price of tangible personal property sold to the United States Government where the transactions constituted a sale of an accessory to an improvement on real property for the United States Government. The government is further prejudiced in these transactions due to the fact that the contractor cannot and does not give a separate stated amount in his invoice of billing to the United States Government relating to taxes on the sale of the property emplaced and therefore, the United States Government has no ground or method by which it may recover the improperly paid tax in connection with the purchased installation.

By a comparison of Section 1615 and Section 1521 of Title 18 of the California Administrative Code, a transaction involving the installation of the items herein questioned by a construction contractor on property owned by an individual or by the State of California, would be classified as a retail sale and hence subject to a sales tax to be collected by the contractor from the customer and payable to the State of California under the provisions of Section 1521(a)(4) of Title 18.

Contrast this with a situation where a construction contractor with the federal government installs identical items on realty owned or leased by the United States Government. In that situation, the Court of Appeal in this case so interpreted Section 6384 of the Revenue and Taxation Code and Section 1615 of Title 18 of the California Administrative Code to constitute such installations as a use by the contractor in an effort to classify the transaction as one which would not be a tax exempt retail sale to the United States Government. It is respectfully submitted that this distorted concept is an unreasonable and impermissible classification by the State of California. Revenue and Taxation Code Section 6384 and Section 1615 of Title 18 of the California Administrative Code discriminate against the federal government and those with whom it deals in this matter, but there is another discrimination in favor of the State of California, which arises in this way: As above stated, the installation of the items in question by a contractor with the State of California (or any of its subdivisions,

or any municipality) would be subject to a sales tax under the definition of "fixtures" as contained in said Section 1521 of Title 18 of the Administrative Code and Honeywell v. State Board of Equalization (supra). The tax on those items would be paid by the construction contractor to the State of California, and therefore, even though the state would be charged in the first instance with payment for the tax, nevertheless, in the final instance. the state receives the tax from the construction contractor and the net effect is that the state has enjoyed a tax exempt transaction. Under the Regulation 1615 of Title 18 of the California Administrative Code (Appendix A) "fixtures" are distinguished from "machinery and equipment" and are defined as things "which are necessary to a structure and so firmly attached to the realty as to constitute a part of the structure. They are essential to the use of the building or other structure . . ." and fixtures are subject to a sales tax in the hands of the contractor. Under that Regulation sales of machinery and equipment to contractors or subcontractors doing business with the United States Government resale to the United States Government are exempt from the tax.

The extent to which California's scheme of taxation has been adopted to exact illegal and unconstitutional taxes from the United States Government is also apparent in the taxation of leases to the United States. Here again, like United States Government contractors, leases of tangible personal property in California are treated differently where the lease is to the

United States or where the lease is to others. The liability for the use tax is on the lessee and it must be collected by the lessor from the lessee at the time rentals are paid. See Sections 6009, 6201, 6203(c), Regulation 1660 California Sales and Use Tax Regulation. Section 6390 exempts from the sales tax rentals payable under a lease of tangible personal property when such rentals are subject to the use tax. When the lessee is not subject to the use tax, however (for example, banks, insurance companies and the United States or its instrumentalities), the sales tax applies. Regulation 1660, supra. Further, the statutory exemption from the sales tax for sales to the United States as set forth in Section 6381 does not extend to the rentals payable on the release of tangible personal property. In other words, with respect to leases of tangible personal property, California imposes a use tax on the lessee, except for leases to the United States (and certain other tax exempt entities under the constitution or state law), as to which it imposes a sales tax. The discrimination in the leasing situation is thus also apparent. For example, with respect to leases in California, including those to the state itself, and excepting only those to the United States (or to banks and insurance companies), the liability for the use tax is imposed on the lessee. See Brandtjen and Kluge v. Fincher, 44 Cal.App.2d Sub. 939, 111 Pac.2d 979 (1941). But when the lease is to the United States)or other tax exempt entity) the sales tax applies, the liability for collection and payment of which is on the lessor. This discriminatory aspect with respect to leases

involving the United States is also the subject matter of the case of the United States of America v. The State Board of Equalization now pending on appeal before the United States Court of Appeals for the Ninth Circuit Case No. 74-3360. The arguments urged by the State Board and by the United States Government with respect to the discriminatory aspect of the taxation of leases involving the United States are in effect similar to the argument made herein by Appellant in connection with the discriminatory aspects of the taxation involving United States Government contractors.

The examples of items that constitute fixtures under Section 1521 is the same as the items that are described under Section 1615 of Title 18 of the Administrative Code and it is submitted that it must therefore follow that similar applications and definitions of a fixture should be uniformly applied whether or not the taxpayer is dealing with the United States Government or with some other person or entity. Under Section 1521 of Title 18 and the case laws heretofore cited by the Appellant, the sale of a fixture would be taxable as a retail sale. An attempt by California to impose a different taxable implication upon the same fixture when such fixtures are installed into a United States Government facility as when they are installed into a non-United States Government facility is the type of invidious discrimination that is unconstitutional for the reason herein set forth.

The discriminatory aspect of Revenue and Taxation Code Section 6384 and Section 1615 of

Title 18 of California Administrative Code is manifested also by the unequal application of taxes which it exacts from United States Government contractors compared to non-United States Government contractors. The legal incidence of the sales tax having been held by this Court to be on the vendee (Diamond National case, supra), a retail sale by a contractor to some one other than the United States Government of a fixture used to improve real property would not result in any sales tax liability to the contractor (vendor) but would fall on the purchaser (vendee). But under Revenue and Taxation Code Section 6384, Title 18 Section 1615 of the California Administrative Code, the same item of personalty sold by a United States Government contractor to the United States Government would result in a use tax liability upon the government contractor.

The fact that California is trying to accomplish indirectly (i.e., impose a use tax with respect to government contractors) and what it cannot do directly (i.e., impose a sales tax upon Government contractors) merely underscores the unconstitutional nature of the tax collected, whether it be viewed as discriminating against the United States and its contractors or a violation of federal immunity.

CONCLUSION

For the reasons stated above and particularly in view of this court's holding in

Diamond National Corporation v. State Board of Equalization, supra, the court should take jurisdiction to review the judgment and opinion of the California Court of Appeal.

Respectfully submitted,

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APPENDICES

APPENDIX A

STATUTES CITED

A. Section 6384 of the California Revenue and Taxation Code (hereinafter R & T Code) provides as follows:

> "Sec. 6384. United States Contractors Notwithstanding any other provision of law the tax imposed under this part shall apply to the gross receipts from the sale of any tangible personal property to contractors purchasing such property, either as agents of the United States or for their own account and subsequent resale to the United States for use in the performance of contracts with the United States for the construction of improvements on or to real property in this state."

B. Section 16007.5 R & T Code provides:

"Sec. 6007.5. (United States Contractors). A sale of tangible personal property to a contractor or subcontractor for use in the performance of contracts with the United States for the construction of improvements on or to real property in this State is a retail sale. The gross receipts from such a sale or the sales price of property so sold shall be included in the measure of the taxes imposed by this part."

TITLE 18 CALIFORNIA ADMINISTRATIVE CODE, SECTION 1521, formerly known as RULE 11.

(Para. 60-112) Reg. 1521. Construction Contractors. -- (a) Definitions: (1) The term "contractor" as used herein includes both general contractors and subcontractors and includes contractors engaged in such building trades as carpentry, bricklaying, cement work, steel work, plastering, sheet metal work, roofing, tile and terrazzo work, electrical work, plumbing, heating, air conditioning, painting and interior decorating.

(2) The term "construction contract" as used herein means a contract for erecting, remodeling or repairing a building or other structures on land and includes lump sum, cost-plus, and time-and-material contracts. The term "construction contract" does not include a contract for the sale and installation of machinery or equipment.

(3) The term "materials" as used herein means tangible personal property which when combined with other tangible personal property loses its identity to become an integran and inseparable part of the completed structure. "Materials" includes such things as:

Bricks
Builders' hardware
Calking material
Cement
Conduit
Electric wiring and connections
Flooring
Glass
Gravel

Insulation
Lath
Lead
Lime
Lumber
Macadam
Millwork
Mortar
Oil
Paint
Paper
Piping, valves and pipe fittings
Plaster
Putty
Reinforcing mesh
Roofing
Sand
Sheet metal
Steel
Stone
Stucco
Tile
Wall board
Wall coping
Wall paper
Weather stripping
Wire netting and screen
Wood preserver

(4) The term "fixtures" as used herein means things which are accessory to a building and which do not lose their identity as accessories when placed or installed. "Fixtures" includes such things as:

Lighting fixtures
Plumbing fixtures
Furnaces, boilers and heating units
Air conditioning units
Refrigeration units
Telephone switchboards and instruments
Elevators, hoists, and conveying units
Awnings and venetian blinds
Burglar alarm and fire alarm fixtures
Vault doors and equipment
Cabinets, counters and lockers (prefabricated)
Signs

(b) Materials Used by Contractors: (1) Contractors are the consumers of materials used by them in fulfilling construction contracts and the tax applies to the sale of such materials to the contractors.

(2) If, however, in the case of a time-and-material contract the contractor bills his customer an amount for "sales tax" computed upon his marked-up billing for materials, it will be assumed, in the absence of convincing evidence to the contrary, that he regards himself as selling the material so billed, and tax will apply to the amount of the billing for materials, it will be assumed, in the absence of convincing evidence to the contrary, that he regards himself as selling the material so billed, and tax will apply to the amount of the billing for materials.

(c) Fixtures Furnished and Installed by Contractors: Contractors are retailers of "fixtures" which they furnish and install and tax applies to the retail selling price thereof; which, in the case of lump-sum construction contracts, is regarded as the cost price of the fixtures to the contractors. If the contractor is the manufacturer of the fixtures, the retail selling price thereof is the prevailing price at which similar fixtures in similar quantities ready for installation would be sold to contractors.

(d) Other Sales by Contractors: Tax applies to all retail sales by contractors, including the furnishing and installation of fixtures (see above),

over-the-counter sales, and "jobbing sales." "Jobbing sales" are repair and replacement jobs in which the materials and fixtures are billed at retail.

(e) Supplies and Tools: Contractors are the consumers of supplies such as oxygen, acetylene, gasoline, acid, thread-cutting oil, and tools and parts for tools, which they use in their business, and the tax applies to the sale of such supplies and tools to contractors.

(f) Resale Certificates and Deductions for "Tax-Paid Purchases Resold": Contractors regularly make retail sales and holding valid seller's permits may purchase "materials" and "fixtures" ex-tax under resale certificates (see Reg. 1668). They may not purchase supplies and tools under resale certificates unless they are actually engaged in the business of selling such property without previously using it. If a contractor makes sales without prior use of any tangible personal property purchased with sales tax or use tax paid on the purchase price, he can obtain credit for the tax so paid by taking a deduction on account of "tax-paid purchases resold" (see Reg. 1701).

Any person who gives a resale certificate and wilfully fails to make proper reports with respect to tangible personal property purchased under such a certificate is subject to the maximum penalties prescribed by law.

(g) Transmission and Distribution Lines: Persons engaged in the erection, installation or

repair of telephone and telegraph lines, electrical transmission and distribution lines, and the poles, towers or conduits by which they are supported or in which they are contained are construction contractors improving real property within the meaning of paragraph (a) of this regulation.

TITLE 18 CALIFORNIA ADMINISTRATIVE CODE, SECTION 1615, formerly known as RULE 12

(Para. 60-168) Reg. 1615. United States Contractors. -- Either the sales tax or the use tax applies with respect to sales of tangible personal property (including materials, fixtures, supplies and equipment) to contractors or subcontractors for use in the performance of contracts with the United States for the construction of improvements on or to real property in this state. The fact that the contract may provide principally for the manufacture or acquisition of tangible personal property is immaterial. The sales tax, but not the use tax, applies even though the contractor purchases the property as the agent of the United States.

Tax does not apply to sales of "machinery and equipment" to contractors or subcontractors. As used herein, the term "machinery and equipment" means property to which each of the following conditions applies:

1. It is not used by the contractor in making the improvements (as distinguished from

supplies and tools, such as steam shovels, cranes, trucks, and hand or power tools, actually used to perform construction work).

2. It is either not attached to the realty or, if attached, is readily removable as a unit (as distinguished from "fixtures," see below).

3. It is installed for the purpose of performing a manufacturing operation or some other function not essential to the structure itself.

4. Title to the property passes to the United States before the contractor makes any use of it.

Examples of "Machinery and Equipment" are:

Portable machines, equipment and tools
Fixture
Vehicles
Lathes, drills, presses, cranes, and other machines and apparatus which may be fastened to the realty but which can be removed without damage to the structure or without substantially impairing its use.

"Fixtures," as distinguished from "machinery and equipment," are things which are necessary to a structure and so firmly attached to the realty as to constitute a part of the structure. They are essential to the use of the building or other structure, and include such things as:

Lighting fixtures
Plumbing fixtures
Furances, boilers and heating units
Air conditioning units
Refrigeration units
Cabinets, counters and lockers
Telephone switchboards and instruments
Elevators, hoists, and conveying units
Awnings and venetian blinds
Burglar alarm and fire alarm fixtures
Vault doors and equipment

APPENDIX B

(FROM PLAINTIFF'S REPLY BRIEF FROM CLERK'S TRANSCRIPT, PAGES 81-83)

"Defendant asserts that Section 6384 and Section 6016.5 are controlling and that for some reason they tend to show that plaintiff was engaged in an act of improving real property rather than selling items of machinery and equipment to the United States. Plaintiff asserts that Section 6384 of the Rev. & Tax. Code is unconstitutional if the effect of the act is to discriminate and place in a separate class persons doing business with the United States Government as opposed to those doing business with the State of California or other political subdivisions. Reference to Section 1521, Title 18, of the Administrative Code indicates that construction contracts do not include contracts for the installation of machinery and equipment. Section 1615 of Title 18 of the Administrative Code further analyzes and describes machinery and equipment. Neither regulation relating to construction contractors defines improvements to real property contrary to the holdings of the G. E. case or the Standard Oil case. It is obvious from reading the regulations of the Board that the Board considers a construction contract to be one for the permanent attachment of a structure to realty and that the installation of trade fixtures are to be considered as a sale with the tax being due in the case of non-exempt persons in the total amount of the transaction including the services rendered as

a par. of the transaction.

Any interpretation of Section 6384 that would change the transaction from a sale to a use by an installing seller simply because he was doing business with the United States Government would render the statute unconstitutional because it would by that interpretation discriminate against the seller doing business with the United States Government. A recent United States Supreme Court case, Phillips Chemical Company v. Dumas Independent School District, 361 U.S. 376, 43 L.Ed.2d 384, 80 S.Ct. 474 renders any State Legsilative enactment void where it seeks to accord different treatment to those dealing with the United States Government from those dealing with other political subdivisions within the state. Beyond this Section 6384 is unconstitutional and void because it is vague in that it does not define contractor, neither does it define improvements to real property as they would apply to sales and use tax transactions in the Standard Oil case. Even the King case states that in a sale of a fixture by a contractor the contractor is compelled to collect reimbursement for the tax that he pays to the state as a sales tax."

JAN 30 1976

Thompson, J.
2+11

APPENDIX C

ORDER DUE
January 30, 1976

ORDER DENYING HEARING

AFTER JUDGMENT BY THE COURT OF APPEAL

2nd District, Division 1, Civil No. 45454

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

CHULA VISTA ELECTRIC COMPANY

v.

STATE BOARD OF EQUALIZATION

Appellant's petition

for hearing DENIED.

SUPREME COURT
FILED
JAN 28 1976
C. E. [illegible], Clerk

WRIGHT
Chief Justice

BEST COPY AVAILABLE

APPENDIX D

CLYDE MAXWELL and JACK B. SILVER
Attorneys at Law
315 South Beverly Drive, Suite 406
Beverly Hills, California 90212
TR 9-4505 CR 7-4505

Attorneys for Plaintiff and Appellant

Apr 15 1976
Received for filing in
Clerk's Office
Court of Appeal
Second Appellate District

COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION ONE

CHULA VISTA ELECTRIC COMPANY, a corporation, Plaintiff and Appellant,	)	Civil No. 45454 (Superior Court No. C942737)
vs.	)	NOTICE OF
STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA, Defendant and Respondent,	)	APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that CHULA VISTA ELECTRIC COMPANY, the appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the

above-entitled Court affirming the opinion of the Superior Court of the State of California, which appellate judgment was entered and filed on December 3, 1975 and Order Modification of Opinion on Denial of Rehearing entered on December 30, 1975 and from the denial of the hearing in the California Supreme Court made on January 28, 1976.

This appeal is taken pursuant to Title 28, United States Code, Section 1257, Subparagraphs 2 and 3.

DATED: April 9, 1976.

/s/ Jack B. Silver
JACK B. SILVER,
Attorney for Appellant

PROOF OF SERVICE BY MAIL

I, JACK B. SILVER, depose and say that I am an attorney of record for the Appellant herein, and that on April 10, 1976, pursuant to Rule 33, Rules of the Supreme Court, I served Notice of Appeal to the Supreme Court of the United States on the parties required to be served herein, as follows:

State Board of Equalization of the State of California

by mailing on April 10, 1976 to the respondent herein, copies of said Notice of Appeal to the Supreme Court of the United States, in a duly addressed envelope with first class postage prepaid to

Evelle J. Younger, Attorney General,
Phillip C. Griffin, Deputy Attorney General,
800 Tishman Building
3580 Wilshire Boulevard
Los Angeles, California 90010

Said mailing was made by depositing the same in the United States Post Office at Beverly Hills, California on said date.

DATED: April 10, 1976

/s/ Jack B. Silver
JACK B. SILVER

Subscribed and sworn to before me on April 10, 1976 at the Los Angeles County, California.

/s/ Julie Neimark
Notary Public in and for said County and State.

APPENDIX E

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION ONE

Court of Appeal Second Dist.
F I L E D
Dec 3 - 1975
CLAY ROBBINS, JR., Clerk
Deputy Clerk

CHULA VISTA ELECTRIC COMPANY, a corporation,	) Civil
Plaintiff and Appellant,	) No. 45454
v.	)
THE STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA,	)
Defendant and Respondent.	)

APPEAL from a judgment of the Superior Court of Los Angeles County. Delbert E. Wong, Judge. Affirmed.

Clyde R. Maxwell for Plaintiff and Appellant.

Evelle J. Younger, Attorney General, and Philip C. Griffin, Deputy Attorney General, for Defendant and Respondent.

- - - - - - -

The case at behcn involves the applicability of the California Sales and Use Tax Law to electrical transmission cable installed by the plaintiff, taxpayer, on real property owned and occupied by the United States pursuant to a contract calling for the removal of worn out cable from its conduit and replacement of it with the new. Sales and use tax are applicable only with respect to sales and purchases at retail of tangible personal property. (Rev. & Tax. Code, §§6051, 6201.) "Electrical transmission and distribution lines" are excluded from the definition of tangible personal property, the sale or purchase of which is the basis for sales or use tax. (Rev. & Tax. Code, §6016.5.) Sales of tangible personal property to the United States are exempt from sales tax. (Rev. & Tax. Code, §6381.) Conversely, sales or use tax is applicable to gross receipts from the sale of tangible personal property to contractors purchasing the property "for use in the performance of contracts with the United States for the construction of improvements on or to real property [in California]." (Rev. & Tax. Code, §6384.)

We conclude that, while electrical transmission and distribution lines are not tangible personal peoperty as that phrase is used in the sales and use tax law, the component parts of the transmission and distribution line, including the cable used to conduct electricity, are. We conclude further that the cable was, on the facts here present, used in the performance of a contract with the United States to improve real property within California. Accordingly, we affirm a trial court judgment denying taxpayer's suit for refund of

use tax paid by it to the state measured by a percentage of the cost to taxpayer of the cable installed by it.

Facts

Taxpayer is an electrical contractor installing wiring in construction projects. It does not manufacture wiring or electrical equipment but purchases the material used to perform its installation work. Taxpayer entered into a contract with the United States to remove approximately 1,200 feet of electrical cable from existing underground conduit at the North Island Air Station and to replace it with new cable. The contract required installation of 12,000 volt capacity cable from the power company's facility, called a meter and switching station, to a substation used to divide the cable inlet into a number of outlet cables leading to buildings, equipment, and motors at the air station. Both the meter and switching station and the substation were movable property.

Taxpayer, acting under the contract, removed the old cable then in the conduit. The cable was salvaged by the United States and sold for scrap. The new cable was drawn into the conduit at the meter and switching station, spliced at manholes, and taken to the substation. The cable lay in but was not attached to the conduit. It was connected to both the meter and switching station, with the remainder used for general electrical purposes such as lighting.

The cable installed by taxpayer was acquired by it at a cost of $90,000 and no sales tax was paid on the purchase. The State of California assessed a use tax measured by the $90,000 purchase price. Taxpayer filed a timely claim for refund, the claim was denied, and taxpayer filed its action to recover the use tax assessed. The trial court found that the tax was properly assessed, and this appeal followed.

Contentions

On this appeal, taxpayer contends: (1) the cable is machinery or equipment exempt from tax when sold to the United States by reason of Revenue and Taxation Code Section 6381; and (2) if the cable is not machinery or equipment, it is not tangible personal property covered by the Sales and Use Tax Law because it is an electric transmission line excluded from the statutory definition of tangible personal property by Revenue and Taxation Code section 6016.5.[1]

---

1 Appellant raises other contentions for the first time in its reply brief without explanation for their omission from its opening brief. We do not consider those new contentions. (Radinsky v. T. W. Thomas, Inc., 264 Cal. App. 2d 75, 81 [70 Cal. Rptr. 150].)

Federal Governmental Sales Exemption

Taxpayer's claim of exemption of the transaction from sales or use tax by reason of Revenue and Taxation Code section 6381 depends upon the characterization of the cable as an improvement to real property or as something else. Section 6384 of the code provides that, despite the exemption in section 6381, sales or use tax is applicable to gross receipts from the sale of tangible personal property to contractors purchasing the property for use in the performance of contracts with the United States for the construction of improvements to real property in California.

California Administrative Code, title 18, section 1615 (formerly ruline 12 of the State Board of Equalization) distinguishes between "machinery and equipment" sold pursuant to a contract with the United States and "fixtures" installed pursuant to such a contract. The latter are treated as improvements to real property while the former are not. Machinery and equipment is defined in part as "either . . . not attached to the realty or, if attached, is readily removable as a unit." "Fixtures," as distinguished from "machinery and equipment," are defined as "things necessary to a structure and so firmly attached to the realty as to constitute a part of the structure [and] essential to the use of the building or other structure . . . ."

Section 1615 of title 18 contrasts with section 1521 of title 18 dealing with the application

of sales and use tax to contracts for the improvement of real property in general. While section 1615 is consistent with section 1521 in treating the contractor as the consumer of material used to fulfilling the contract (subd. (b)) and in ruling that a construction contract does not include an agreement for the installation of machinery and equipment (subd. (a)(2)), section 1615 provides that contractors are "retailers" of fixtures which they furnish and install.

The provisions of the Administrative Code are entitled to great credence in the interpretation of provisions of the Sales and Use Tax Law with which they are compatible (Henry's Restaurants of Pomona, Inc. v. State Bd. of Equalization, 30 Cal.App.3d 1009, 1020-1021 [106 Cal.Rptr. 867]). They are so treated by the parties to the case at bench.

The electrical transmission line as a whole is a structure which is part of the real property. (C. R. Fedrick, Inc. v. State Bd. of Equalization, 38 Cal.App.3d 385, 399-400 [112 Cal.Rptr. 598]; A. S. Schulman Electric Co. v. State Bd. of Equalization, 49 Cal.App. 3d 180, 184 [122 Cal.Rptr. 278]; see also Cal. Admin. Code, tit. 18, § 1521, subd. (g).) If the cable installed by taxpayer is necessary to the transmission line and so firmly attached to the structure as to become part of it, the cable is then a fixture within the meaning of title 18, section 1615 of the Administrative Code.

Unquestionably, the cable is necessary to the transmission line as a whole. The line will not operate without it. There remains only the question whether the cable is so attached to the conduit structure as to be a fixture. In the context of the law of fixtures, attachment to the realty is a concept broader than physical annexation. Adaptation to use with the real property and the intention with which the property is installed (Collins Electrical Co. v. County of Shasta, 24 Cal.App.3d 864, 868 [101 Cal.Rptr. 285]; 3 Witkin, Summary of Cal. Law (8th ed.) Personal Property, § 56) must be considered as well as physical annexation.

The taxpayer has the burden of proof of establishing his right to a refund (Marchica v. State Board of Equalization, 107 Cal.App.2d 501, 510 [237 P.2d 725]), and hence of proving that the cable in the case at bench is not a fixture to the transmission line. The trial court's determination that the tax was properly assessed is supported by taxpayer's failure to carry its burden.

Taxpayer introduced no evidence of the intent of its customer, the United States, in contracting for the installation of the cable. (See Collins Electrical Co. v. County of Shasta, supra, 24 Cal.App.3d 864, 868.) The cable itself is a massive installation. It is particularly adapted to use with the real property. Taxpayer's evidence on the nature of the cable relevant to the elements of its character as a fixture is limited to testimony that the cable has a life

of 20 years and is salvageable for scrap when withdrawn from the conduit. Removability alone of what is otherwise a fixture does not, however, change its character. (A. S. Schulman Electric Co. v. State Bd. of Equalization, supra, 49 Cal. App. 3d 180, 184, fn. 2; Collins Electrical Co. v. County of Shasta, supra, 24 Cal. App. 3d 864, 868.) Since the evidence establishes elements other than intent necessary to the characterization of the cable as a fixture and the taxpayer failed to carry its burden of proof on the element of intent, the trial court's treatment of the cable as used in the performance of a contract for the improvement of real property must be sustained.

Taxpayer's reliance upon Honeywell, Inc. v. State Bd. of Equalization, 48 Cal. App. 3d 897 [122 Cal. Rptr. 237], as standing for a contrary conclusion is misplaced. Honeywell, as does Coast Elevator Co. v. State Bd. of Equalization, 44 Cal. App. 3d 576 [118 Cal. Rptr. 818], upholds the approach of section 1521 of title 18 of the California Administrative Code treating the contractor as the retailer of fixtures installed by him on real property. Honeywell and Coast Elevator are concerned with the definition of a sale of tangible personal property in the context of Revenue and Taxation Code section 6006, including receipts from such a sale within the measure of sales and use tax. They do not involve the special provision of Revenue and Taxation Code section 6384 dealing with sales of personal property to contractors for use in the performance of contracts with the United States for the construction of improvements of real

property within California. Section 6384 repres represents an effort to extend the tax base to the maximum degree constitutionally permissible in light of restrictions upon direct state taxation of the United States and its instrumentalities. (C. R. Fedrick, Inc. v. State Bd. of Equalization, supra, 38 Cal. App. 3d 385, 395.) It must be construed accordingly.

Revenue and Taxation Code Section 6016.5

Taxpayer's second contention that the cable is not tangible personal property and hence is not the subject of sales or use tax depends upon the meaning of "electrical transmission lines," as that term is used in section 6016.5 excluding electrical transmission lines from the statutory definition of taxable tangible personal property. The atmosphere in which section 6016.5 was enacted by the Legislature indicates that the term "electrical transmission line" refers to the line as a whole and not ot its component parts such as the cable.

Sometime prior to the early 1960's, the State Board of Equalization asserted authority to impose sales tax upon the installation of electrical transmission lines in a fashion different from other construction contracts. While in the case of construction contracts in general the tax base included only the cost of tangible materials used in the job, the board, relying upon an Attorney General's opinion dealing with property taxation, sought to include installation labor cost as well as the cost of tangible materials in

measuring the sales tax payable iy the installer of an electrical transmission line. Litigation challenging the board's approach ensued. (King v. State Bd. of Equalization, 22 Cal.App.3d 1006, 1010, 1014 [99 Cal.Rptr. 802]; C. R. Fedrick, Inc. v. State Bd. of Equalization, supra, 38 Cal. App.3d 385 [112 Cal.Rptr. 598]; A. S. Schulman Electric Co. v. State Bd. of Equalization, supra, 49 Cal.App.3d 180.)

While the litigation was pending, the Legislature enacted Revenue and Taxation Code section 6016.5, excluding from the definition of tangible personal property subject to sales and use tax "telephone and telegraph lines, electrical transmission and distribution lines, and the poles, towers, or conduits by which they are supported or in which they are contained." The enactment was accompanied by a statement that it was prospective only, leaving prior law unaffected. (Stats. 1965, ch. 1960, § 3.) The statement, however, merely "manifested a 'hands off' attitude [and] neither confirmed nor rejected the past, but relegated pending uncertainties to judicial determination." (King v. State Bd. of Equalization, supra, 22 Cal.App.3d 1006, 1009; cf. C. R. Fedrick v. State Bd. of Equalization, supra, 38 Cal.App.3d 385, stating at different points in the opinion that the enactment "changed" the board's policy, fn. 12 at p. 394, and that the enactment "codified" the board's policy, text at p. 400.)

In none of the litigation which found its way into a reported decision did the taxpayer

assert that the sales and use tax was inapplicable to the cost of component tangible materials used in the construction of the transmission lines. The sole issue dealt with the inclusion of the value of installation labor in measure of tax.

The coincidence of the enactment of Revenue and Taxation Code section 6016.5 with the litigation cannot be ignored. Absent anything to the contrary, the section must be viewed as reaction to the board's position and resistance to it by installers of transmission lines who were faced with discriminatory tax treatment. So considered, the purpose of section 6016.5 was to relieve the installers from the board imposed requirement that they include the cost or value of installation labor in their tax base, placing them in parity with others performing contracts to improve real property.

Section 6016.5 does not exclude from the definition of tangible personal property the component tangible parts of an electrical transmission line any more than it excludes the component tangible parts of any other improvement to real property constructed by a contractor. The equality of treatment purpose of the section is not served by the exclusion. We thus conclude that section 6016.5 of the Revenue and Taxation Code excludes from the definition of tangible personal property only completed electrical, telephone, and telegraph lines, and does not exclude components used in the construction or repair of the lines. Since the cable installed by taxpayer is a component and not a complete

electrical transmission line, the board properly treated the cable as tangible personal property.

Disposition

The judgment is affirmed.

CERTIFIED FOR PUBLICATION.

THOMPSON, J.

We concur:

LILLIE, Acting P. J.

HANSON, J.

APPENDIX F

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE

STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

CHULA VISTA ELECTRIC COMPANY, a corporation,	)	Civil No. 45454
Plaintiff and Appellant,	)	(Sup. Ct. No. C942737
v.	)	Court of Appeal Second Dist.
THE STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA,	)	FILED DEC 30 1975
	)	Clay Robbins, Jr. Clerk
Defendant and Respondent	)	Deputy Clerk

MODIFICATION OF OPINION ON DENIAL OF REHEARING

THE COURT:

Good cause appearing therefor, the opinion opinion filed on December 3, 1975 in the above entitled cause is modified by the Court as follows:

The phrase "section 1615" appearing on line 5 of page 6 is changed to read "section 1521."

The petition for rehearing is denied.

RECEIVED

JAN 2 '76

D. R. MAXWELL

APPENDIX G

Copy below is hereby certified to be a true and correct copy of regulations adopted, or amended, or an order of repeal by:

State Board of Equalization
(Agency)

Date of adoption, amendment, or repeal:

By: W. W. Dunlop

Executive Secretary
(Title)

After proceedings had in accordance with the provisions of the Administrative Procedure Act (Government Code, Title 2, Division 3, Part 1, Chapter 4.5) and pursuant to the authority vested by Section 7051 of the Revenue and Taxation Code, and to implement, interpret, or make specific Sections 6006-6010, 6012, 6016.3, 6016.5, 6054.5, 6055, 6091-6095, 6203.5, 6241-6246, 6384, 6386, and 6421 of the Revenue and Taxation Code, the State Board of Equalization hereby amends its regulations in Title 18, Chapter 2, Subchapter 4 of the California Administrative Code as follows:

Amend Section 1521 to read:

1521. Construction Contractors

(a) DEFINITIONS

(1) CONSTRUCTION CONTRACT

(A) "Construction contract" means and includes a contract, whether on a lump sum, time and material, cost plus, or other basis, to:

1. Erect, construct, alter, or repair any building or other structure, project, development, or other improvement on or to real property, or
2. Erect, construct, alter, or repair any fixed works such as waterways and hydroelectric plants, steam and atomic electric generating plants, electrical transmission and distribution lines, telephone and telegraph lines, railroads, highways, airports, sewers and sewage disposal plants and systems, water works and water distribution systems, gas transmission and distribution systems, pipelines and other systems for the transmission of petroleum and other liquid or gaseous substances, refineries and chemical plants, or
3. Pave surfaces separately or in connection with any of the above works or projects, or

4. Furnish and install the property becoming a part of a central heating, air-conditioning, or electrical system of a building or other structure, and furnish and install wires, ducts, pipes, vents, and other conduit imbedded in or securely affixed to the land or a structure thereon.

(B) "Construction contract" does not include:

1. A contract for the sale or for the sale and installation of tangible personal property such as machinery and equipment, or
2. The furnishing of tangible personal property under what is otherwise a construction contract if the person furnishing the property is not responsible under the construction contract for the final affixation or installation of the property furnished.

(2) CONSTRUCTION CONTRACTOR. "Construction contractor" means any person who for himself, in conjunction with, or by or through others, agrees to perform and does perform a construction contract. "Construction contractor" includes subcontractors and specialty contractors and those engaged in such building trades as carpentry, bricklaying, cement work, steel work, plastering, drywall installation, sheet metal work,

roofing, tile and terrazzo work, electrical work, plumbing, heating, air-conditioning, elevator installation and construction, painting, and persons installing floor coverings, including linoleum, floor tile, and wall-to-wall carpeting, by permanently affixing such coverings to a floor.

(3) UNITED STATES CONSTRUCTION CONTRACTOR. "United States construction contractor" means a construction contractor who for himself, in conjunction with, or by or through others, agrees to perform and does perform a construction contract for the United States Government.

(4) MATERIALS. "Materials" means and includes construction materials and components, and other tangible personal property incorporated into, attached to, or affixed to, real property by contractors in the performance of a construction contract and which, when combined with other tangible personal property, loses its identity to become an integral and inseparable part of the real property. A list of typical items regarded as materials is set forth in Appendix A.

(5) FIXTURES. "Fixtures" means and includes items which are accessory to a building or other structure and do not lose their identity as accessories when installed. A list of typical items regarded as fixtures is set forth in Appendix B.

(6) MACHINERY AND EQUIPMENT. "Machinery and equipment" means and includes property intended to be used in the production, manufacturing or processing of tangible personal property, the performance of services or for other purposes (e.g., research, testing, building, or structure itself, but which property incidentally may, on account of its nature, be attached to the realty without losing its identity as a particular piece of machinery or equipment and, if attached, is readily removable without damage to the unit or to the realty. "Machinery and equipment" does not include junction boxes, switches, conduit and wiring, or valves, pipes, and tubing incorporated into fixed works, buildings, or other structures, whether or not such items are used solely or partially in connection with the operation of machinery and equipment, nor does it include items of tangible personal property such as power shovels, cranes, trucks, and hand or power tools used to perform the construction contract. A list of typical items regarded as machinery and equipment together with a list of typical items not regarded as machinery and equipment is set forth in Appendix C.

(7) TIME AND MATERIAL CONTRACT. "Time and material contract" means a contract under which the contractor agrees to furnish and install materials

or fixtures, or both, and which sets forth separately a charge for the materials or fixtures and a charge for their installation or fabrication.

(8) LUMP SUM CONTRACT. "Lump sum contract" means a contract under which the contractor for a stated lump sum agrees to furnish and install materials or fixtures, or both. A lump sum contract does not become a time and material contract when the amounts attributable to materials, fixtures, labor, or tax are separately stated in the invoice.

(b) APPLICATION OF TAX.

(1) UNITED STATES CONSTRUCTION CONTRACTORS.

(A) Materials and Fixtures. United States construction contractors are consumers of materials and fixtures which they furnish and install in the performance of contracts with the United States Government. Either the sales tax or the use tax applies with respect to sales of tangible personal property (including materials, fixtures, supplies, and equipment) to contractors for use in the performance of contracts with the United States for the construction of improvements on or to real property in this state. The fact that the contract may provide principally for the manufacture

or acquisition of tangible personal property is immaterial. The sales tax, but not the use tax, applies even though the contractor purchases the property as the agent of the United States.

(B) Machinery and Equipment. United States contractors are retailers of machinery and equipment furnished in connection with the performance of a construction contract with the United States Government. Tax does not apply to sales of machinery and equipment to United States contractors or subcontractors, provided title to the property passes to the United States before the contractor makes any use of it. Such sales are sales for resale, and the purchasing contractor may issue a resale certificate. A contractor who uses the machinery or equipment before title passes to the United States is the consumer of that machinery or equipment and either sales tax or use tax applies with respect to the sale to or the use by the contractor.

(2) CONSTRUCTION CONTRACTORS OTHER THAN UNITED STATES CONSTRUCTION CONTRACTORS

(A) Materials.

1. In General. Construction contractors are consumers of materials which they furnish and

install in the performance of construction contracts. Either sales tax or use tax applies with respect to the sale of the materials by the construction contractor.

2. When Contractor is Seller. A construction contractor may contract to sell materials and also to install the materials sold. If the contractor explicitly provides for the transfer of title to the materials prior to the time the materials are installed, and separately states the sale price of the materials, exclusive of the charge for installation, the contractor will be deemed to be selling the materials.

   In the case of a time and material contract, if the contractor bills his customer an amount for "sales tax" computed upon his marked up billing for materials, it will be assumed, in the absence of convincing evidence to the contrary, that he is selling the materials.

   If the sale occurs in this state, the sales tax applies to the contractor's (retailer's) gross receipts from the sale of the materials. If the sale occurs prior to the time the property is

brought into this state, the contractor's (retailer's) customer is the consumer and his use (unless otherwise exempt) is subject to use tax measured by the sale price. The contractor must collect the use tax and pay it to this state.

(B) Fixtures

1. In General. Construction contractors are retailers of fixtures which they furnish and install in the performance of construction contracts and tax applies to their sales of the fixtures.
2. Measure of Tax.
   a. In General. If the contract states the sale price at which the fixture is sold, tax applies to that price. If the contract does not state the sale price of the fixture, the sale price shall be deemed to be the cost price of the fixture to the contractor.
   b. Determining Cost Price. If the contractor purchases the tixtures in a completed condition, the cost price is deemed to be the sale price of the fixture to him and shall include any manufacturer's excise tax or import duty imposed with respect to the fixture prior to its sale by the contractor.

If the contractor is the manufacturer of the fixture, the cost price is deemed to be the price at which similar fixtures in similar quantities ready for installation are sold by him to other contractors.

If similar fixtures are not sold to other contractors ready for installation, then the cost price shall be deemed to be the amount stated in the price lists, bid sheets or other records of the contractor.

If the sale price cannot be established in the above manner and the fixture is manufactured by the contractor, the cost price shall be deemed to be the aggregate of the following:

[1] Cost of materials, including such items as freight-in and import duties,

[2] Direct labor, including fringe benefits and payroll taxes,

[3] Specific factory costs attributable to the fixture,

[4] Any manufacturer's excise tax,

[5] Prorata share of all overhead attributable to the

manufacture of the fixture, and,

[6] Reasonable profit from the manufacturing operations which, in the absence of evidence to the contrary, shall be deemed to be 5 percent of the sum of the preceeding factors.

Jobsite fabrication labor and its prorated share of manufacturing overhead must be included in the sale price of the fixture. Jobsite fabrication labor includes assembly labor performed prior to attachment of a component or fixture to a structure or other real property.

3. Exceptions - Leased Fixtures. In some instances the construction contractor may furnish and install a fixture for a person, other than the owner of the realty, who intends to lease the fixture in place as tangible personal property as provided in Section 6016.3 of the Revenue and Taxation Code and pay tax measured by rental receipts.

   In this case the construction contractor may take a resale certificate from the lessor at the time

of the transaction and the sale to the lessor will be considered to be a sale for resale. The resale certificate should indicate that the fixture is purchased for resale by the purchaser as tangible personal property under Section 6016.3 of the Revenue and Taxation Code.

(C) Machinery and Equipment.

1. In General. Construction contractors are retailers of machinery and equipment even though the machinery and equipment is furnished in connection with a construction contract. Tax applies to the contractor's gross receiptx from such sales.
2. Measure of Tax.
   a. In General. Tax applies to the gross receipts from the sale of machinery and equipment furnished and installed by a construction contractor. If the contract calls only for the furnishing and installation of machinery and equipment, tax applies to the total contract price less those charges excludable under Section 6012 of the Revenue and Taxation Code.
   b. Lump Sum Contracts - Determining Gross Receipts. If the contract is for a lump sum and

includes the furnishing and installation of materials, fixtures, and machinery and equipment, the gross receipts from the sale of the machinery and equipment shall be the price at which similar quantities ready for installation are sold at retail delivered in the market area where the installation takes place.

If there is no such retail price for the machinery and equipment, then the gross receipts shall be determined from the contracts, price lists, bid sheets, or other records of the contractor.

If the gross receipts cannot be established in the above manner and the machinery and equipment is manufactured by the contractor, the gross receipts from the sale shall be the aggregate of the following:

[1] Cost of materials, including such items as freight-in and import duties,
[2] Direct labor, including fringe benefits and payroll taxes,
[3] Specific factory costs attributable to the machinery

or equipment,

[4] Any manufacturer's excise tax,

[5] Prorata share of all overhead attributable to the machinery or equipment, including overhead attributable to manufacturing, selling, contracting and administration, and

[6] Reasonable profit from the manufacture and sale of the machinery or equipment which, in the absence of evidence to the contrary, shall be deemed to be 5 percent of the sum of the preceeding factors.

Jobsite fabrication labor and its pro]rated share of manufacturing overhead must be included in the sale price of the fixture. Jobsite fabrication labor includes assembly labor performed prior to attachment of a component or a fixture to a structure or other real property.

(D) Cost Plus A Fee Contracts. When a contractor enters into a construction contract for a cost plus a fee or time and materials plus a fee, whether the fee is a lump sum or a percentage of costs, the fee is not included in the measure of tax.

When the contractor is the manufacturer of the fixtures or machinery and equipment, the "cost price" of the fixtures and the gross receipts from the sale of the machinery and equipment shall be determined in accordance with (B) and (C) above.

(3) MISCELLANEOUS SALES BY CONTRACTORS. In addition to sales of fixtures and machinery and equipment, tax applies to all retail sales by contractors of tangible personal property, including parts, supplies, tools, construction equipment, building severed or to be severed by the contractor, and furniture, including furniture sold with a building, even though the building is sold "in place."

(4) PERMITS. Contractors engaged solely in performing construction contracts which do not involve the sale and installation of fixtures and who do not also engage in business as sellers or retailers are not required to hold seller's permits. However, if a contractor is a seller or retailer because he makes sales of fixtures, materials, or machinery and equipment, or other tangible personal property either in connection with or as part of a construction contract, or otherwise, he is required to hold a seller's permit.

(5) SUPPLIES AND TOOLS FOR SELF-USE. Contractors are the consumers of supplies such as oxygen, acetylene,

gasoline, acid, thread-cutting oil, and tools and parts for tools, which they use in their business, and the tax applies to the sale of such supplies and tools to contractors.

(6) EXEMPTION CERTIFICATES.

(A) Resale Certificates. Contractors holding valid seller's permits may purchase fixtures and machinery and equipment for resale by issuing resale certificates to their suppliers. They may not purchase materials for resale unless they are also in the business of selling materials. Except under the circumstances described in the first paragraph of subsection (b)(2)(A)2. Or except under the circumstances described in the first paragraph of subsection (b)(2)(B)3. a contractor cannot avoid liability for sales or use tax on materials or fixtures furnished and installed by him by taking a resale certificate from the prime contractor, interior decorators, designers, department stores, or others.

(B) Exemption Certificates for Out-of-State Use. Sales tax does not apply to sales of tangible personal property to a construction contractor who holds a valid California seller's permit when the property is used by the contractor outside this state in his performance of a contract to

improve real property and as a result of such use the property is incorporated into and becomes a part of real property located outside this state. This exemption is available only if at the time of the purchase the contractor certifies in writing to the seller that he holds a valid California seller's permit (giving the number of that permit and identifying the property purchased) and states that the property will be used in the manner stated above. The certificate must be signed by the contractor or an authorized employee. Such a certification may appear in the body of a purchase order which bears the signature of the purchaser. Any certificate given subsequent to the time of purchase will not be recognized.

If the property purchased under a certificate is used by the contractor in any other manner or for any other purpose than stated in the certificate, the contractor shall be liable for sales tax as if he were a retailer making a retail sale of the property at the time of such use, and the sale price of the property to him shall be deemed the gross receipts from the sale.

(C) Deductions for Tax-Paid Purchases Resold. If a contractor who holds a valid seller's permit makes a sale without prior use of any tangible personal property purchased with sales tax reimbursement or use tax paid on the purchase price, he can obtain credit for the tax so paid by taking a deduction on his return for the period in which the sale occurs on account of "tax-paid purchases resold." In the event that the contractor sells short ends or pieces which are not used other than in severing them from larger units purchased by him and as to which he has paid sales tax reimbursement or use tax, he may claim the deduction for tax-paid purchases resold, but the amount of the deduction shall not exceed the price at which he sells such short ends or pieces.

(c) PARTICULAR APPLICATIONS.

(1) DRAPERIES AND DRAPERY HARDWARE. Persons who contract to sell and install draperies including drapery hardware, such as brackets, rods, tracks, etc., are retailers of the items which they furnish and install. Tax applies to the entire contract price exclusive of the charge for installation which charge should be separately stated. Installers who furnish drapery hardware or other tangible personal property may

accept resale certificates from department stores or other sellers to furnish and install the draperies and drapery hardware.

The department stores or other sellers furnishing resale certificates are required to pay the tax to the state upon their selling price of the draperies and drapery hardware, exclusive of installation charges. The installer should segregate his installation charge in order that the department store or other seller may properly segregate its charge attributable to installation for purposes of determining its taxable gross receipts.

(2) PREFABRICATED CABINETS. A cabinet will be considered to be "prefabricated" and a "fixture" when 90 percent of the total direct cost of labor and material in fabricating and installing the cabinet is incurred prior to affixation to the realty. In determining this 90 percent, the total direct cost of all labor and materials in fabricating the cabinet to the point of installation will be compared to the total direct cost of all labor and materials in completely fabricating and installing the cabinet. If more than one cabinet is fabricated and installed under the contract, each cabinet will be considered separately in determining whether the cabinet is prefabricated.

(3) PREFABRICATED BUILDINGS. Prefabricated units such as mobile homes, house trailers, etc., registered with the Depart ment of Motor Vehicles, are tangible personal property even though they may be connected to plumbing and utilities. A mobile home which meets or is modified to meet, all applicable building codes and regulations and which is permanently affixed to realty, is an improvement to realty and is not personal property. Generally portable buildings which merely rest on redwood sills, piers or like property and are attached to realty only through plumbing and utility hookups are personal property.

Prefabricated and modular buildings, other than the type described above, affixed to the realty in a manner indicating that they are intended to remain permanently or indefinitely in place are improvements to realty for the purposes of this regulation. It is immaterial whether the buildings are erected upon or affixed to land owned by the owner of the building or are leased to the landowner or lessee of the land.

Prefabricated or modular buildings which are "factory-build housing" as defined in Regulation 1521.2, where permanently affixed to the realty are improvements to realty. When installed by a person who purchases the factory-

built houseing, tax applies as provided in Regulation 1521.2. The manufacturer of factory-built housing who contracts to furnish and install the factory-built housing manufactured by him is the consumer of the materials used in building and installing the factory-built housing and the retailer of the fixtures, tax applies as provided in (b) above.

(4) REPAIR CONTRACTS. Contracts to repair fixtures are contracts for the sale and installation of parts when the sale price of the parts is billed separately from the repair labor. Tax applies to the sale price of the parts.

A contractor who enteres into a lump sum contract to repair a fixture in place or a fixture he is required by the contract to reaffix to the realty is the consumer of parts used.

(5) ELEVATOR INSTALLATIONS. A large number of components are included in the installation of an elevator system. Those portions constituting the cage or platform and its hoisting machinery are fixtures. The balance of the installation, if attached to a structure or othe real property will generally be "materials."

Similarly, installation of escalators and moving sidewalks are in part fixtures and in part materials.

Following are examples of components constituting part of the cage or platform and its hoisting machinery, and which are fixtures:

alarm bell
cab or car
car doors
car platform and sling
door hanger on cab
door openers
door operator on cab or car
door safety edge on cab
door sills on cab
electronic door protector
jack assembly
motors
power units and control boxes
pumps
pushbuttons on cab
wire and piping (which are components of a fixture)

Following are examples of components constituting "materials" when attached to realty:

car guides
casing section of jack assembly
guide rails
hoistway doors
hoistway door safety edge
hoistway door sills and jambs
hoistway door supports
hoistway entrance

pushbuttons on hoistway
rail brackets
sill, struts
sound insulating panels on "materials"
structural steel (unless part of cab, car, or other "fixture")
valve strainer
wire and piping attached to "materials"

Following are examples of components constituting parts of escalators or moving sidewalks which are fixtures:

staircase
moving sidewalk
moving handrails
chains
sprockets
motors
other operating mechanisms

(6) DEEP-WELL AGRICULTURAL PUMPS. A deep-well agricultural pump is tangible personal property is installed so that it rests in position by force of gravity and is not otherwise affixed to the land.

The pump is a fixture if:

(A) It is affixed to the land such as by concrete, bolts or screws,

(B) It is physically connected to an irrigation system such as by pipes or couplings so as to become an integral part of the system, or

(C) It is enclosed by a pump house or other building or structure.

(7) EXCESS REIMBURSEMENT. If a construction contractor who furnishes and installs materials under a lump sum contract (i.e., a contract for a lump sum without separately stating amounts for material, labor, etc.) does separately state items when billing his customer, including sales tax reimbursement on the contract price, or any lesser or greater amount, the amount so billed is excess reimbursement and must be returned to the customer or paid to the state. Nevertheless, the contractor, as a consumer, is liable for tax measured by the sales price of the materials to him unless he purchased them tax paid.

For example, a contractor agrees to furnish and install wall-to-wall carpeting for a customer for $1,000. He bills his customer for $1,000 plus $60 "sales tax." The $60 is excess tax reimbursement which must be refunded to the customer or paid to the state. The contractor must report and pay tax measured by the sales price to him of the materials (carpet, padding, carpet tackless strips, tacks, etc.) which he used in furnishing and installing the carpet unless those items were purchased by him tax paid.

By stating his contract price as one sum ($1,000), the contractor has retained his status of a consumer. Accordingly, the sale of the materials to him is taxable, no further sales tax liability is due from him on this transaction, and any billing for sales tax constitutes excess tax reimbursement. For a situation where the contractor can become a retailer of materials, see (b)(2)(A)2.

(d) EFFECTIVE DATE. To the extent that is this regulation constitutes a change in Regulation 1521 and 1615, or the interpretations of those regulations, the changes shall be effective only with respect to contracts entered into on and after April 1, 1976.

Appendix A The following is a list of typical items regarded as materials:

Asphalt
Bricks
Builders' hardware
Calking material
Cement
Conduit
Doors
Ducts
Electric wiring and connections
Flooring
Glass

Gravel
Insulation
Lath
Lead
Lime
Linoleum
Lumber
Macadam
Millwork
Mortar
Oil
Paint
Paper
Piping, valves, and pipe fittings
Plaster
Power poles, towers, and lines
Putty
Reinforcing mesh
Roofing
Sand
Sheetmetal
Steel
Stone
Stucco
Tile
Wall coping
Wallboard
Wallpaper
Wall-to-wall carpeting (when affixed to the floor)
Weather stripping
Windows
Window Screens
Wire netting and screen
Wood preserver

Appendix B The following is a list of typical items regarded as fixtures:

Air conditionin units
Awnings
Burglar alarm and fire alarm fixtures
Cabinets, counaers, and lockers (prefabricated)
Elevators, hoists, and conveying units
Furnaces, boilers, and heating units
Lighting fixtures
Plumbing fixtures
Refrigeration units
Signs
Telephone swichboards and instruments
Television antennas
Transformers and swichgear
Vault doors and equipment
Venetian blinds

Appendix C The following are lists of typical items regarded as:

Machinery and Equipment
Drill presses
Electric generators
Lathes
Machine tools
Moving parts of cranes
Printing presses

Not Machinery or Equipment
Fixtures and materials as defined in this regulation
Wiring, piping, etc., used as a source of power, water, etc., for machinery and equipment
Radio transmission antennas
Large tanks (i.e., over 500 barrel

Fire alarm systems
Street light standards
Cooling towers other than small prefabricated cooling units

(2) Repeal Section 1615.

(3) Amend Section 1642(h)(2) to read:

Subparagraphs (b)(2)(A)2. and (b)(2)(B)3. of Regulation 1521 recognize two instances when a contractor is considered to be selling materials to his custome before he installs them. In those two instances only, when the contractor reports and pays tax on the sales price of the materials and the receivable is thereafter found to be worthless and is charged off for income tax purposes, a bad debt deduction may be taken by the contractor.

Since a contractor is the retailer of fixtures (other than those used in performance of contracts with the Unit ed States), bad debt losses incurred in connection with the furnishing and installing of fixtures are to be treated in the same

manner as those resulting from other types of retail sales.

* * * * *

This order shall take effect on April 1, 1976.

(Sales and Use Tax Regulations - Title 18, Chap 2, Subchapter 4, California Administrative Code)

1521

NOTE: Authority Cited: Section 7051, Revenue and Taxation Code

Reference: Sections 6006-6010, 6012, 6015, 6016.3, 6016.5, 6054.5, 6055, 6091-6095, 6203.5, 6241-6246, 6384, 6386, 6421, Revenue and Taxation Code

1615

NOTE: Authority Cited: Section 7051, Revenue and Taxation Code

Reference: Sections 6006-6010, 6012, 6015, 6016.3, 6016.5, 6054.5, 6055, 6203.5, Revenue and Taxation Code

1642

NOTE: Authority Cited: Section 7051, Revenue and Taxation Code

Reference: Section 6384, Revenue and Taxation Code; Section 9 of Chapter 681, Statutes of 1941.

Supreme Court, U. S.
FILED
MAY 28 1976

IN THE

Supreme Court of the United States

October Term, 1975
No. 75-1561

CHULA VISTA ELECTRIC COMPANY, a corporation,

Appellant,

vs.

STATE BOARD OF EQUALIZATION, an agency of the State of California,

Appellee.

On Appeal From the Court of Appeal of the State of California, Second Appellate District, Division One

MOTION TO DISMISS OR AFFIRM

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IN THE

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STATE BOARD OF EQUALIZATION, an agency of the State of California,
Appellee.

On Appeal From the Court of Appeal of the State of California, Second Appellate District, Division One

MOTION TO DISMISS OR AFFIRM

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves the Court to dismiss this appeal or to affirm the judgment of the Court of Appeal, Second Appellate District of the State of California.

There is no substantial federal question presented as a basis of jurisdiction in the Court inasmuch as (1) the questions were not properly raised in the California courts and not decided in the California courts despite a belated attempt to raise the second issue claiming discrimination against United States contractors for the first time in a petition for rehearing in the California Court of Appeal which was denied without an opinion and again in a petition for hearing

in the California Supreme Court which was also denied without an opinion and (2) the questions have been foreclosed by previous decisions of this Court.

The decision of the California Court of Appeal does not deal with the questions because they were not raised in the trial court or on appeal. In any event, under the rule of this Court in the case of *Alabama v. King & Boozer,* 314 U.S. 1 (1941), the California *use* tax was properly asserted against the taxpayer herein based upon the consumption of tangible personal property in the performance of a lump-sum construction contract for the United States. The contractor-taxpayer in this case was the purchaser and the tax was imposed on him as such, *not* on the United States. Therefore, under *Alabama v. King & Boozer,* the tax did not violate the sovereign immunity of the United States. The cases of *Diamond National Corporation v. State Board of Equalization* and *Crocker-Citizens National Bank v. State Board of Equalization,* consolidated in Case No. 75-1038 decided April 19, 1976; *First Agricultural National Bank of Berkshire County v. State Tax Commission,* 392 U.S. 339 (1968) and *United States v. Tax Commission of Mississippi,* 421 U.S. 599 (1975) do not require a contrary result because in those cases a United States instrumentality was the purchaser from whom sales tax was collected. Since 1941, this Honorable Court has upheld state sales and use tax on contractors doing business with the United States even as to cost-plus contracts even though the terms of the contracts force their payment out of the federal treasury because the legal incidence of the tax is on the contractor, not the government. This is the exact factual situation presented in this appeal. California taxes the sale of tangible personal

property to contractors for use in the performance of construction contracts where the property consists of materials such as cable as was installed in this case on the Navy's North Island Air Station. The sales tax is imposed on the retailer who sells to the contractor. Rev. & Tax. Code § 6051. The retailer may collect reimbursement from the contractor if he chooses to do so and the contractor consents. Rev. & Tax. Code § 6052. If the contractor chooses to give a resale certificate instead of paying sales tax reimbursement and later uses the property in the performance of a contract for construction, he must pay use tax. Rev. & Tax. Code §§ 6094 and 6201. In this case, appellant either gave a resale certificate to the retailer of the cable or otherwise purchased the cable ex-tax and used the cable in the performance of a contract with the United States for the improvement of real property in California. Under section 6384 of the Rev. & Tax. Code all tangible personal property sold to contractors for such a use is subject to tax on the sale to the contractor. The Board collected use tax and appellant claimed a refund.

There is a category of tangible personal property which is not taxed when sold to a contractor for resale to the United States called "machinery and equipment" which is usually involved in a construction contract but never becomes an improvement to real property. Such property is tax exempt when sold to the United States under section 6381 of the Revenue and Taxation Code and former Regulation 1615 of the California Administrative Code. *See:* pages A-6 through A-8 of Appellant's Jurisdictional Statement. Appellant based its appeal on this state law. Appellant's principal contention was that the cable was "machinery and

equipment" but the Court of Appeal held that the cable was instead a "fixture" as defined in Regulation 1615, purchased for use in construction of an improvement to land. The validity of section 6384 and Regulation 1615 was not raised in the Court of Appeal until appellant failed to come within its terms at which time appellant petitioned for rehearing claiming section 6384 and Regulation 1615 were invalid. This argument was not heard. The petition was denied and the Supreme Court denied a hearing.

Appellant relies upon an erroneous construction of the California Sales and Use Tax Law and cases that are inapposite to reach a conclusion that is totally unsound under both California and federal law. At page 8 of Appellant's Jurisdictional Statement it is contended that sections 6007.5 and 6384 of the Revenue and Taxation Code create a sales tax on contractors who in doing business with the United States would collect from the United States so that the incidence of the tax would be on the United States. The plain language of the sections contradicts such a construction and Regulations 1521 (*See* pages A-2 through A-4 of Appellant's Jurisdictional Statement) and 1615 plainly indicate that the sales tax is imposed on the supplier of the contractor and a use tax is imposed on the contractor who fails to pay the tax to his supplier and then uses the property in the performance of a construction contract. The same rule applies to all contractors, not just United States Contractors who install electrical cable on land. Sections 6007.5 and 6384 of the Revenue and Taxation Code do not go beyond the holding of the *Alabama v. King & Boozer* case. Section 6384 treats United States contractors as

consumers, that is, purchasers at retail as are all contractors in California with respect to electrical cable which they install. Thus, sales tax is imposed on their suppliers as retailers. This is the settled law of California and no state or federal court has ever ruled to the contrary. The recent cases relied upon by appellant are inapposite because under those decisions the incidence of tax is on the United States or its instrumentality as the purchaser. But, in this case the purchaser is the contractor, not the United States.

In an attempt to make it appear that there is a substantial federal question appellant complains that to tax the contractor for his purchase that he uses after giving a resale certificate somehow discriminates against the United States or contractors with whom it deals. In the first place, this issue was not properly raised in the state courts and was not even discussed by the court below.

Secondly, the great bulk of the argument is directed to the treatment of "fixtures" sold by contractors but the cable here was not a "fixture" under Regulation 1521 as it read then or reads now, but rather a "material." *See* pages A-2 through A-3 of Appellant's Jurisdictional Statement.

The Court of Appeal held that the cable was not "machinery and equipment" under Regulation 1615 but rather a "fixture" as defined in that regulation. Regulation 1615 only defined "fixtures" to differentiate them from "machinery and equipment." The definition was too broad and has, since this case was decided, been eliminated by repeal of Regulation 1615. The remaining portions of Regulation 1615 have been incorporated into new Regulation 1521. As to cable

which is classified as "material" all contractors are treated alike and appellant has no grounds for complaint in this case.

In any event, there is no discrimination against the United States nor against contractors with the United States. The tax imposed by reason of section 6384 on government contractors is generally not as great as that imposed on private contractors. The Board, in Regulation 1521, has always provided that contractors are retailers of "fixtures," that is tangible personal property that is accessory to a building when installed. The Board in former Regulation 1615 and new Regulation 1521 has provided that *all* tangible personal property including accessory tangible personal property installed by *government* contractors is purchased by them for consumption in the performance of their government contracts and is therefore taxed on the basis of the purchase price paid for the tangible personal property and not the price charged to the federal government. Therefore, when it comes to property which is accessory to a building, government contractors pay less tax than private contractors. Hence there is no unconstitutional burden on the contractor dealing with the United States government but in fact favorable treatment of the government contractor.

This same question was presented by counsel for appellant in the case of *C. R. Fedrick, Inc. v. State Board of Equalization, cert. denied,* 419 U.S. 1120 (1974). It is respectfully submitted that the opinion of the Court of Appeal correctly disposes of the only issue in the case, the application of former Regulation 1615 under section 6384. No substantial federal question has been raised because the questions were presented too late in the California courts and were not considered. Further, this Honorable Court has already decided the question of the incidence of the tax in United States contractor cases and denied certiorari on the issue of discrimination against United States contractors.

Questions Presented by Appellant

1. Whether sections 6007.5 and 6384 of the California Revenue and Taxation Code and Regulations 1521 and 1615 of Title 18 of the California Administrative Code violate the Federal Government's constitutional immunity from state taxation.

2. Whether sections 6007.5 and 6384 of the California Revenue and Taxation Code and Regulations 1521 and 1615 of Title 18 of the California Administrative Code unconstitutionally discriminate against the United States and its contractors.

Statement of Facts

Appellant is an electrical contractor installing wiring in construction projects. It does not manufacture wiring or electrical equipment but purchases the material used to perform its installation work. Appellant entered into a contract with the United States to remove approximately 1,200 feet of electrical cable from existing underground conduit at the North Island Air Station and to replace it with new cable. The contract required installation of 12,000 volt capacity cable from the power company's facility, called a meter and switching station, to a substation used to divide the cable inlet into a number of outlet cables leading to buildings, equipment, and motors at the air station. Both the meter and switching station and the substation were movable property.

Appellant, acting under the contract, removed the old cable then in the conduit. The cable was salvaged by the United States and sold for scrap. The new cable was drawn into the conduit at the meter and switching station, spliced at manholes, and taken to the substation. The cable lay in but was not attached to the conduit. It was connected to both the meter and switching station and the substation. Ninety-five percent of the power in the line was used to operate machinery at the air station, with the remainder used for general electrical purposes such as lighting.

The cable installed by appellant was acquired by it at a cost of $90,000 and no sales tax was paid on the purchase. *The State of California assessed a use tax measured by the $90,000 purchase price.* Appellant filed a timely claim for refund, the claim was denied, and taxpayer filed its action to recover the use tax assessed. The trial court found that the tax was properly assessed, and this appeal followed.

ARGUMENT

I

Appellant Is Precluded From Raising Constitutional Questions Not Properly Raised in the California Courts

It is apparent from the allegations in the complaint of appellant in the California trial court (Appendix A) and the Conclusions of Law of the trial court in California (Appendix B) that no question as to the constitutionality of the Sales and Use Tax Law of the State of California was raised as an issue or decided as one by the California trial court. There was no pleading in the complaint that a claim for refund had been filed on any other grounds than those set forth in the complaint. On appeal in the Court of Appeal appellant raised no question on the constitutionality of sections 6007.5 and 6384 or the regulations and has made no reference in its jurisdictional statement to having raised the question. Appellant relies solely upon a statement at page 451 of the opinion (Appendix p. E-9) describing the intent of section 6384 as a holding on the issue of the validity of that section. The language speaks for itself and is not a holding because the issue was not before the court nor does the language express an opinion as to the validity of the section. The first time the second issue was presented is found in a petition for rehearing. (Appendix C.) The Court of Appeal denied rehearing without considering the question. (See pp. F-1 through F-2 of Appellant's Jurisdictional Statement.) The Petition for Hearing in the California Supreme Court raised the second issue (Appendix D) and the Supreme Court denied hearing without consid-

ering the question. (See Appendix C of Appellant's Jurisdictional Statement.) Under California appellate procedure questions raised for the first time in a petition for rehearing cannot be urged for appellate review. *Sinclair v. Aquarius Electronics, Inc.*, 42 Cal. App. 3d 216, 229 (1974); *People ex rel. Dept. of Public Works v. Mascotti*, 206 Cal. App. 2d 772, 780 (1962). At no time has appellant ever raised the first question on this appeal in the California courts.

The procedure by which a taxpayer may bring suit in California to recover sales and use tax is governed solely by statute. Sections 6901 to 6902[1] require the filing of a claim for refund with the Board. The claim must be in writing and must state the *specific* grounds on which the claim is based. § 6904. Moreover, failure to properly file a claim with the Board within the time allowed by law constitutes a waiver of any demand against the state on account of the overpayment. §6902. Only after this claim for refund is denied or not acted upon can the taxpayer bring a suit in the courts of California against the Board *upon the grounds set forth in the claim.* §§ 6932 and 6933. This procedure is jurisdictional in nature. *Abelleira v. District Court of Appeal*, 17 Cal. 2d 280, 293 (1941). In *Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69 (1946), this Honorable Court unequivocally held that the claim for refund *frames and restricts* the issues for litigation, and must set forth the specific grounds upon which the claim is founded. To the same effect is *King v. State Board of Equalization*, 22 Cal. App. 3d 1006, 1015 (1972).

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[1]All references are to the California Revenue and Taxation Code.

The Board strongly contends that, based upon the authority cited above, appellant is limited to the legal issues as alleged and set forth in its complaint. Certainly, petitioner is limited to the questions in issue on appeal and not issues that were raised by petitions for rehearing and hearing for the first time on appeal. *Hanson v. Denckla*, 357 U.S. 235, 243-44 (1958). Beyond question petitioner is limited to questions that were specifically dealt with by the Court of Appeal. *Standard Vacuum Oil Co. v. United States*, 339 U.S. 157, 160 (1949); *Edelman v. California*, 344 U.S. 357, 358-59 (1952) and *Beck v. Washington*, 369 U.S. 541, 549-54 (1962). Therefore, the Board submits that in this petition the only legal issues that petitioner may raise are those specifically set forth as grounds in its complaint or properly raised on appeal. We respectfully submit that none of the questions presented by the Jurisdictional Statement were properly raised or considered by the Court of Appeal of the State of California and that therefore petitioner has not raised any substantial federal question for consideration by this Honorable Court.

II

The California Use Tax Which Is Imposed on Contractors as Purchasers Doing Construction Business With the United States Places the Legal Incidence of the Tax on the Contractor and Not the United States

Appellant for the first time in this case contends that the incidence of the California sales tax on sales to United States contractors and the equivalent use tax on them falls upon the federal government. The Board strongly disagrees. The legal incidence of the

sales tax on retail suppliers of contractors is on the retail supplier under *California law* which is the applicable law where the United States or one of its instrumentalities is *not* the purchaser. The legal incidence of the use tax on the contractor is on the contractor and not upon the United States under California and federal law. In this case the Board has not imposed a sales tax on the transaction between appellant and the United States but rather a use tax on appellant by reason of the fact that the property was used or consumed in a construction contract. California law makes no provision that a use tax paid by a purchaser may be collected from the purchaser's customer. Appellant was the purchaser of the cable and could have paid sales tax reimbursement to its supplier because sales tax on the supplier would have been due had appellant not given a resale certificate. Under no circumstances was the United States the purchaser in the taxable transaction in this case. Therefore, California law as discussed below should be applied to this appeal. *Diamond National Corporation v. State Board of Equalization, supra.*

Section 6007.5 provides:

> "A sale of tangible personal property to a contractor or subcontractor for use in the performance of contracts with the United States for the construction of improvements on or to real property in this State is a retail sale. The gross receipts from such a sale or the sales price of property so sold shall be included in the measure of the taxes imposed by this part."

Section 6384 provides:

> "Notwithstanding any other provision of law the tax imposed under this part shall apply to the gross receipts from the sale of any tangible personal property to contractors purchasing such property either as the agents of the United States or for their account and subsequent resale to the United States for use in the performance of contracts with the United States for the construction of improvements on or to real property in this State."

Regulation 1615 provides:

> "United States Contractors. Either the sales tax or the use tax applies with respect to sales of tangible personal property (including materials, fixtures, supplies and equipment) to contractors or subcontractors for use in the performance of contracts with the United States for the construction of improvements on or to real property in this state. The fact that the contract may provide principally for the manufacture or acquisition of tangible personal property is immaterial. The sales tax, but not the use tax, applies even though the contractor purchases the property as the agent of the United States.
>
> "Tax does not apply to sales of 'machinery and equipment' to contractors or subcontractors." (Emphasis added.)

Regulation 1521 provides:

> "Contractors are consumers of *materials* used by them in fulfilling construction contracts and the tax applies to the sale of such materials to the contractors.

"If, however, in the case of a time and material contract, the contractor bills his customer an amount for 'sales tax' computed upon his marked up billing for materials, it will be assumed, in the absence of convincing evidence to the contrary, that he regards himself as selling the materials so billed, and tax will apply to the amount of the billing for materials.

"*Contractors are retailers of 'fixtures' which they furnish and install and tax applies to the retail selling price thereof;* which, in the case of lump sum construction contracts, is regarded as the cost price of the fixtures to the contractors. If the contractor is the manufacturer of the fixtures, the retail selling price thereof is the prevailing price at which similar fixtures in similar quantities ready for installation would be sold to contractors." (Emphasis added.)

Generally "materials" are those materials which are used in constructing buildings, whereas "fixtures" under Regulation 1521 are accessories to the buildings which are installed such as lighting, plumbing, heating, air conditioning, refrigeration, elevator and other equipment for use in the operation of the building itself as distinguished from an activity within the building.

It is clear under the holdings of the California appellate cases that appellant's suppliers would bear the legal incidence of the California sales tax and that its application to their gross receipts from sales to appellant would be valid. There is no evidence that appellant was an agent for the United States. Appellant

was taxed use tax on tangible personal property acquired ex-tax or on resale certificates. Therefore, even were appellant's contentions correct, the tax fell *not* on the United States but on appellant and was constitutional even under the contention that the California sales tax is on the purchaser, which of course, it is not under California law. *Alabama v. King & Boozer,* 314 U.S. 1(1941).

The California Supreme Court in *Western L. Co. v. State Bd. of Equalization,* 11 Cal. 2d 156, 162 (1938) said:

"The provisions of the act itself specifically are that the tax is laid upon and is a direct obligation of the retailer. Although the act furnishes the method by which the retailer may calculate reimbursement to himself by listing separately the amount of the tax from the sales price, *nevertheless section 8½ and other provisions of the act specially negative any intent of the legislature that the tax should be considered as a tax on the consumer.* In every case in which that question has arisen under the California Retail Sales Tax Act, the courts have uniformly and consistently recognized the legislative intent and adhered to the construction that the tax is upon the retailer and not upon the consumer. [Citations.]" (Emphasis added.) 11 Cal. 2d 156 at 162.

The court then went on to point out:

"The law contemplates the imposition of the fixed rate of the tax on the gross receipts, as defined by the act, and not on the individual sale of merchandise; and the provision for a book-

keeping method to compute the amount of the tax separately from the sales price does not alter this fact (Roth Drug, Inc. v. Johnson, supra, p. 738.) 'That in ultimate effect the fund out of which payment [of the tax] is made may be or in fact has been obtained by the dealer from his customers does not make the tax a levy upon the consumer.' (People v. Herbert's of Los Angeles, Inc., supra.)

"*As noted in Meyer Construction Co. v. Corbett, supra, the act creates the relationship of sovereign power and taxpayer between the state and the retailer, and not between the state and the consumer.* Therefore when the question has been whether the tax is collectible on receipts from sales to municipalities with the state for use in governmental functions it has been held that the retailer must pay the tax. (Rio Grande Oil Co. v. Los Angeles, supra; Graham Brothers v. Los Angeles, supra.)" (Emphasis added.) 11 Cal. 2d 156 at 163.

The court, after pointing out that the purpose of separately stating the amount of sales tax reimbursement was designed to avoid including the amount of sales tax reimbursement in the measure of the tax, went on to state:

". . . *The tax being a direct obligation of the retailer and, so far as the consumer is concerned, a part of the price paid for the goods and nothing else, it is neither in fact nor in effect laid upon the consumer. It does not become a tax on the sale nor because of the sale, but remains an excise tax for the privilege of conducting a retail business measured by the gross receipts from sales.*" (Emphasis added.) 11 Cal. 2d 156 at 164.

This remains the California rule except for sales to the United States and its instrumentalities under the *Diamond National* case. Nor does the *Western L. Co.* case stand alone as establishing the construction by the California appellate courts of the California sales tax as a tax on the retailer and not on the purchaser. The California appellate courts have consistently held that as to the purchaser the amount added as sales tax reimbursement is only part of the purchase price. *De Aryan v. Akers,* 12 Cal. 2d 781, 786 (1939).

Appellant asserts that the government contractor is the taxpayer since section 6384 of the Revenue and Taxation Code appears in the exemption provisions. We hasten to point out, however, that section 6007.5 on the same subject appears among the tax provisions. This provision does not change the nature of the tax or the taxpayer. The "tax imposed under this part" refers to the sales tax and applies "to the gross receipts (of suppliers) from the sale of *any* tangible personal property to contractors . . . for use in the performance of contracts with the United States for the construction of improvements on or to real property." The tax is imposed on the sale to the contractor and forbids the use of a resale certificate by making the contractor the final consumer as are all contractors in California and throughout most of the country.

In reading the cases, it is clear that the line is clearly drawn between *Kern-Limerick v. Scurlock,* 347 U.S. 110 (1954), and *King & Boozer, supra.* The

most recent California citation of *King & Boozer* is in *City of Los Angeles v. A.E.C. Los Angeles,* 33 Cal. App. 3d 933 at 940, where the court states:

> "Thus the fact that a municipal tax is imposed in a fashion which permits its ultimate economic burden to be passed on to a higher governmentality unit does not invalidate it (see General Dynamic Corporation v. County of Los Angeles, 51 Cal. 2d 59, 63 [330 Pac.2d 794]; Kaiser Co. v. Reid, supra, 30 Cal. 2d 610; Alabama v. King and Boozer, 31 U.S. 1."

King & Boozer was also cited in *United States v. Mississippi Tax Commission, supra,* 421 U.S. 599, 610 (1975).

In summation, it is the Board's position that its interpretations of sections 6384 and 6007.5 are that the sale to the government contractor is the taxable retail sale, and not the sale by the contractor at the time the property is used in construction. No tax was required to be passed on and collected from the United States. No tax was collected from the United States. Therefore the legal incidence of the use tax in this case was not on the United States but rather on the contractor. None of the cases cited by appellant establish that *King & Boozer* is not the present law in this area.

III

Sections 6007.5 and 6384 of the California Revenue and Taxation Code and Sections 1521 and 1615 of the California Administrative Code Are Valid and Do Not Constitute an Invidious Discrimination Against the Federal Government and Its Contractors

Appellant contends that section 6384 and necessarily section 6007.5 of the California Revenue and Taxation Code and sections 1521 and 1615 of the California Administrative Code as interpreted and applied by the Court of Appeal are unconstitutional as constituting an invidious discrimination against the federal government and those with whom it deals contrary to the rule in *Phillips Chemical Co. v. Dumas Independent School District,* 361 U.S. 376 and *Moses Lake Homes, Inc. v. Grant County,* 365 U.S. 744.

Section 6384 is designed to tax suppliers of construction contractors for the United States so as to treat all contractors fairly and in line with sales taxation as it affects United States contractors throughout the country.

In actuality, appellant seeks to take advantage of the tax-exempt status of the United States to acquire building materials without paying sales tax as all other contractors in California must do. There is no discrimination against appellant or the United States but instead equal and sometimes favorable treatment. California has merely legislated to avert a manifest injustice by preventing the perversion of the tax immunity of the United States for the benefit of a business entity which was never the intention of the United States Constitution. A little history of the development of the statutes and the two regulations will demonstrate this point.

Following the enactment of the Retail Sales Tax Act, effective August 1, 1933, the original rule of the Board pertaining to contracts involving contractors was adopted by the Board in 1933 and designated as Ruling No. 11, Contractors and Subcontractors. This ruling later became Regulation 1521. Under the ruling, certain installation contractors were considered to be retailers rather than consumers of the equipment and components, and sales tax liability with respect thereto was measured by the fair retail price of the property exclusive of installation charges provided the charges were segregated in the records of the contractor. Otherwise, tax was payable on the full contract price. The purpose of the regulation was to prevent the taxation of nontaxable installation services by distinguishing between contractors primarily selling services and those primarily selling tangible personal property.

There was no change in the ruling with respect to such installations until April 21, 1937, when the wording of Ruling 11 was revised, but the basic application of the tax was unchanged. The installer continued to be regarded as the retailer of equipment, taxable on its fair retail price if segregated in his records from the installation charges.

On March 23, 1939, amendments to Ruling 11 included the use, for the first time, of the terms "materials" and "fixtures." Each term was defined, along with an illustrative, but not exclusive, list of the kinds of property included in each category. The ruling provided that contractors were consumers of "materials" and retailers of "fixtures." The measure of tax, with respect to "materials," was stated to be the gross receipts from the sale of the "materials" to the contractor.

The measure of tax with respect to "fixtures" was stated to be the "retail selling price" of the fixtures, which, in case the contractor

> "includes installation of fixtures in a contract, along with materials, labor, and other services, and, accordingly, does not invoice the selling price of the fixtures separately from the other items of the contract, the selling price of the fixtures shall be deemed to be the fair retail selling price of such fixtures, which shall not be less than the price at which similar fixtures, in similar quantities, would be sold to other contractors."

Subsequent amendments to Ruling 11 made no change in the application of the tax with respect to "materials" or "fixtures," except in the case of contracts with the United States. An amendment effective June 11, 1941, added the following paragraph:

> "Contractors are the consumers of tangible personal property (including materials, supplies, fixtures, and equipment) used in the performance of contracts with the United States for the construction of improvement to real property, and the tax applies to the gross receipts from the sale of such tangible personal property to the contractors."

This amendment *was required* to conform the ruling to section 5.3 of the Retail Sales Tax Act of 1933 (later renumbered as section 6384 of the Sales and Use Tax Law). This section became effective also June 11, 1941, the same date as the amendment to the ruling, and provided:

> "Notwithstanding any other provision of law the tax imposed under this act shall apply to the gross receipts from the sale of *any* tangible

personal property to contractors purchasing such property either as the agents of the United States or for their own account and subsequent resale to the United States for use in the performance of contracts with the United States for the construction of improvements on or to real property." (Emphasis added.)

Because the section provided that tax applies to the sale of *any* tangible personal property to contractors with the United States improving real property, it was necessary to provide in the ruling that such a contractor was the consumer not only of "materials," but of "fixtures" as well.

In 1943, effective July 11, the Retail Sales Tax Act of 1933 and the Use Tax Act of 1935 became part of the Revenue and Taxation Code, known and cited as the "Sales and Use Tax Law." Section 5.3 of the Retail Sales Tax Act became section 6384 of the Sales and Use Tax Law, and, effective July 1, 1943, Ruling 12 was adopted, entitled "United States Contractors," based upon section 6384, and superseding the paragraph added to Ruling 11 in 1941 relating to United States contractors. Ruling 12 later became Regulation 1615.

As noted in the history of the law and rulings, section 6384 *requires* a different application of tax with respect to "fixtures" sold to United States contractors, as compared to "fixtures" sold to other contractors.

The case of *General Electric Company v. State Board of Equalization,* 111 Cal. App. 2d 180, 191-92 (1952) specifically points to section 6384 as necessitating such "duality of treatment," in the following clear, unambiguous language at page 192:

"Rule 12 was made necessary by the specific provisions of the tax statute. Section 6381 of the Revenue and Taxation Code exempts from the sales tax gross receipts derived from the sale of tangible personal property to the United States. Section 6384 of that code, in order that the state shall collect some tax, requires that contractors shall be regarded as consumers. Unless they were so treated, contractors with the United States would pay no tax at all. This appears to be a reasonable basis for this classification between contractors."

The case of *Western L. Co. v. State Bd. of Equalization, supra,* 11 Cal. 2d 156 was decided in 1938, the year before section 6381 was enacted. At the time the case was decided, the only tax exemption in the law for sales to the United States was provided in section 5 of the 1933 Retail Sales Tax Act which exempted, "the gross receipts from sales of tangible personal property which this state is prohibited from taxing *under the Constitution or laws of the United States of America,* or under the *Constitution* of this *State.*" The *Western L. Co.* case held that under the Constitution of the United States and the State of California, a sales tax is not an unconstitutional tax upon a federal instrumentality unless it is imposed directly upon that federal instrumentality. The California sales tax is imposed on the retailer. Only reimbursement is collected from the purchaser. The following year in 1939, the Legislature enacted section 5.1 of the Retail Sales Act of 1933, which provided:

"There are hereby specifically exempted from the provisions of this act and from the computation of the amount of taxes levied, assessed or payable hereunder the gross receipts from the sale

of any tangible personal property to the United States or any agency or instrumentality thereof except a corporate agency or corporate instrumentality."

This act was an urgency measure and was explained as necessary because,

"Bids running into millions of dollars have been submitted by California firms to the Federal Government for contracts to supply necessary materials for Federal construction projects.

"All these bids were submitted upon the assumption that the Retail Sales Act of 1933 was inapplicable to receipts derived from sales to Federal instrumentalities. Recently however, the redefinition of the scope of state authority to tax Federal instrumentalities has made such receipts subject to that Act.

"Unless this Act goes into immediate effect, the firms which have submitted these bids will be compelled to withdraw them. bids submitted by firms in other States will be accepted instead, and the material well-being of the people of California will be definitely impaired and retarded."

This section, subsequently in 1941, became section 6381 of the Revenue and Taxation Code and obviously provides for an exemption from sales tax on a retailer when that retailer makes a sale to a federal instrumentality regardless of the lack of a constitutional exemption as decided in the *Western L. Co.* case. The *Diamond National* case has restored the constitutional immunity of the United States where sales are made to it.

Section 6384, upon which Regulation 1615 on United States contractors is based, precludes the use by contractors of the Constitutional exemption of the United States by taxing sales of *any* property to United States contractors to be used in performing construction contracts to improve real property. This has the effect of imposing tax upon sales of "fixtures" to United States contractors which through the ordinary operation of Regulation 1521 would be exempt as sales for resale to the United States. This section, as above explained, did in fact enlarge the tax base by applying the tax to sales to United States contractors of certain property, including "fixtures," that could otherwise have been exempt as sales for resale to the United States depending upon the contract with the United States.

Regulation 1615 merely implements section 6384 which taxes the sale of *all* tangible personal property to contractors when used in government land improvement contracts. Without section 6384 and Regulation 1615, contractors could set up their contracts to resell all materials and fixtures to the United States. Normally a contractor would prefer to be a consumer to keep the tax measure and hence the contract price down. In either case, section 6381 and under *Diamond National* the Constitution of the United States would exempt the transaction if the contractor invoiced materials and fixtures to the United States rather than charge a lump sum price.

Appellant dwells upon the definitions of "fixtures" in Regulations 1521 and 1615. It must be remembered as explained above that because of section 6384 there can be no different tax application between sales of "materials" and sales of "fixtures" to United States

government contractors. the only distinction drawn by Regulation 1615 is between "fixtures" and "machinery and equipment," the latter being considered personal property sold by the contractor to the United States, under certain conditions. These sales *are* tax exempt by express language in the regulation. The term "fixtures" is defined in differing terminology in the two regulations, and hence does not have the same meaning in both regulations. The purpose of the definition of a "fixture" in Regulation 1521 is to distinguish "fixtures" from "materials," that is why "materials" are defined as being combined with each other, integral and inseparable parts of the completed structure, whereas "fixtures" are defined as accessories and which do not lose their identity as accessories when placed or installed. The distinction sought in these definitions is that between those portions of the building which have become incorporated and inseparable from the completed structure and those portions which are clearly identifiable as *accessories* and removable after having been placed or installed.

The purpose of the definition of "fixtures" in Regulation 1615 is to distinguish "fixtures" which are taxable when purchased by a contractor because of their intended use as improvements to realty under section 6384 of the Revenue and Taxation Code from "machinery and equipment" which is not taxable in that such units are not a part of a structure on land. Consequently, fixtures are defined, "fixtures," as distinguished from "machinery and equipment," are things which are necessary to a structure and so firmly attached to the realty as to constitute a part of the structure. They are essential to the use of the building or other

structure. The definition disregards the distinction between "materials" and "fixtures" so as to emphasize the distinction between "fixtures," and "machinery and equipment." The 1615 definition of "fixtures" presupposes the 1521 definition.

It should be noticed, however, that the word "inseparable" is left out of that definition. This leaves room for the distinction between "materials" and "fixtures." The purpose of the definition is merely to distinguish "fixtures" from "machinery and equipment" which are not a part of the structure nor accessory to the structure itself and which according to section 6384 of the Revenue and Taxation Code would not be taxable because they are not "improvements on or to real property to this State." Thus, there is no disparity between the two definitions because they have entirely different purposes. As noted above, the different tax treatment of "fixtures" in United States government and non-United States government contracts is necessitated by section 6384.

Actually, the definition of "fixtures" as used in Regulation 1615 describes property that would fall within the definition of "materials" in Regulation 1521 and in this case the cable is a good example because the Court of Appeal held that the cable was a "fixture" and not "machinery and equipment." This is consistent with the law, since section 6384 in legal effect wipes out the distinction between "materials" and "fixtures" insofar as sales to United States construction contractors is concerned. Appellant's analysis of the law is erroneous and therefore its conclusion is without any legal foundation.

In summary then, it is the statutory policy of the State of California under section 6381 of the Revenue and Taxation Code to exempt from sales taxation, sales to the United States or its instrumentalities. *Diamond National* has rendered this section superfluous. Under this section, in the absence of any other statute, contractors for United States government improvements to real property would not pay any sales tax on "materials" or "fixtures" used in such construction because under the law they could be purchasing for resale to the United States and would be exempted from tax. They would not have to pay sales tax reimbursement or use tax as the "materials" and "fixtures" would be purchased for resale. Inasmuch as the resale would be to the United States government, it would be tax exempted under section 6381 of the Revenue and Taxation Code and now under the United States Constitution. It is for this reason that the Legislature, in order to impose a limit on this statutory exemption, and now necessarily the constitutional one, enacted section 6384 to provide that contractors of the United States government make taxable purchases of the "materials" and "fixtures" which they use in the construction of improvements on or to real property in this state. Regulation 1615 is *required* by that statute. Therefore, Regulation 1615 alone cannot be held to be discriminatory against United States contractors. The authority cited by appellant is no answer, particularly in light of *General Electric* which upheld the regulation of the State Board of Equalization under section 6384 of the Revenue and Taxation Code.

Contractors both for the state and its political subdivision and the federal government are taxed as consumers of "materials" which become an integral and inseparable part of the completed structure and consequently are assessed identical taxes.

The facts are that if a construction contractor, performing a construction contract for the improvement of real property in this state for the United States government, purchased "materials" as defined in Regulation 1521 for such use, and the same contractor purchased identical materials for use in constructing a similar or identical building for a non-United States government customer, the tax would be imposed upon the same measure. A sales tax would be imposed on the retailer selling to the contractor in both instances. This is the exact situation we have in this case in the installation of the cable which is a "material" under California law.

Under section 6006 and Regulation 1521 all but United States contractors are retailers of "fixtures." This law, in fact, imposes a greater tax on the non-government contractor than a government contractor would bear in some cases because the government contractor is never treated as a retailer of tangible personal property in United States government contracts. He only pays sales tax reimbursement on his cost of purchase. The case in which the tax is greater on the private contractor is where a manufacturer of fixtures is also the installing contractor. Appellant

did not manufacture any of the property in this case and has no standing to complain. This is true because the manufacturing contractor must pay sales tax on the cost of the labor and overhead involved in the fabrication of any fixture. A government contractor would not have to pay such tax but would be deemed a consumer of the materials used in the manufacture of the fixture. It would appear that appellant's argument fails because of its reliance on *Moses Lake Homes v. Grant County,* 365 U.S. 744, 751 (1961), where it is stated:

> "If anything is settled in the law, it is that a State may not discriminate *against* the Federal Government or its lessees." (Emphasis added.)

In the Board's administration of the Sales and Use Tax Law the United States government construction contractor is certainly not discriminated *against* insofar as measure of tax is concerned. In fact, in the usual case, the United States government contractor pays less tax with respcet to a similar construction job for the improvement to real property because he is a consumer of fixtures rather than the retailer of them. A more accurate description of appellant's complaint is that the opportunity to manipulate a contract so as to avoid a fair tax by utilizing the exempt status of a customer has been thwarted. But section 6384 is a legitimate law that tries to equalize taxpayers in the same business.

Conclusion

Wherefore, appellee respectfully submits that the questions here involved are insubstantial and appellee respectfully moves the Court to dismiss the appeal. If the question appears to this Honorable Court to be clearly settled in appellee's favor, under the law appellee moves the Court, in the alternative, to affirm the judgment entered in the case by the California Court of Appeal.

Respectfully submitted,

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State Board of Equalization.

APPENDIX A

Complaint for Refund of Sales and Use Taxes

In the Superior Court of the State of California, in and for the County of Los Angeles.

Chula Vista Electric Company, a corporation, Plaintiff, vs. The State Board of Equalization of the State of California, Defendant. No. 942737.

Filed: November 8, 1968.

I

Plaintiff is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of California.

II

Defendant is, and at all times herein mentioned was, an agency of the State of California. This action is brought against defendant under the authority of Section 6933 of the California Revenue and Taxation Code.

III

California Sales and Use Tax was paid pursuant to rules of the California State Board of Equalization for the period October 1, 1964 to December 31, 1967 and erroneously included certain items upon which Sales and/or Use Taxes were paid erroneously, the particulars of which are set out in paragraphs IV through VI herein.

IV

On said payment of California Sales and Use Tax, plaintiff Chula Vista Electric Company erroneously included as taxable, certain items of machinery, equipment and personalty which were installed by plaintiff for

the use of and sale to the United States Government at various locations within the State of California and plaintiff erroneously paid Sales and Use Tax thereon.

V

On said payment of California Sales and Use Tax, plaintiff Chula Vista Electric Company erroneously included as taxable a measure of tax on certain items of machinery, equipment and personalty which were sold for resale by the plaintiff subsequent to October 1, 1964 and plaintiff erroneously paid Sales and Use Tax thereon.

VI

On said payment of California Sales and Use Tax, plaintiff Chula Vista Electric Company erroneously paid as taxable, tax on specific sales wherein the measure of tax used was computed in error on fabrication labor, material, services and separately-stated transportation charges.

VII

As a result of the erroneous payments of Sales and Use Taxes as aforesaid, plaintiff Chula Vista Electric Company overstated Sales and Use Taxes owing by it to the State Board of Equalization of the State of California for the period of October 1, 1964 to December 31, 1967 in the amount of $10,000.00.

VIII

A claim for refund of the amounts erroneously paid by the plaintiff Chula Vista Electric Company for the period commencing October 1, 1964 and ending December 31, 1967 was filed with defendant on or about February 29, 1968. A true copy of said claim for refund is attached hereto, marked Exhibit "A", and incorporated herein by reference.

IX

Said claim for refund was denied by defendant on August 6, 1968 and notice thereof mailed to plaintiff Chula Vista Electric Company on August 13, 1968.

WHEREFORE, plaintiff prays judgment:

1. For a refund of $10,000.00 for overpayment of tax; and
2. For interest of 6% from date of payment of tax, pursuant to Section 6936 of the California Revenue and Taxation Code.

DATED: November 8, 1968.

MAXWELL & SHEAHAN
By /s/ Daniel R. Sheahan
DANIEL R. SHEAHAN
Attorney for Plaintiff

APPENDIX B

Findings of Fact and Conclusions of Law

Superior Court of the State of California, for the County of Los Angeles.

Chula Vista Electric Company, corporation, Plaintiff, v. The State Board of Equalization of the State of California, Defendant. No. 942737.

Filed: June 3, 1974.

The above entitled matter came on regularly for trial on November 5, 1973, before the Honorable Delbert E. Wong, Judge Presiding. Plaintiff was represented by its attorney, Clyde R. Maxwell, and defendant was represented by its attorneys, Evelle J. Younger, Attorney General, Philip C. Griffin and Mark W. Jordan, Deputy Attorneys General. The court, having considered the evidence presented to it; and having read and considered the briefs filed by the parties; and being fully advised in the premises, hereby makes its Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT

1. Plaintiff is an electrical contractor, which obtained a contract to install electrical cable at the Naval Air Station in San Diego, California. The cable was installed in underground conduits, being attached at one end to a switching station which received 12000 volts from the power company, and at the other end to substations.

2. The cable transmitted the power it received through its length to the various substations and there

the power was distributed through the cable to the building or equipment it was meant to power.

3. At the substations, the main cable was broken down into six or seven cables through which the power was sent to buildings or equipment.

4. The sole purpose of the cable was to conduct electricity and carry power from one substation to another.

5. The cable is an integral part of an electrical distribution and transmission system.

6. This cable, once plaintiff had installed it as part of an electrical distribution or transmission system, became an improvement to real property.

7. Plaintiff consumed and used tangible personal property in the course of installing the cable which became an improvement of real property.

From the foregoing findings of fact, the court makes the following:

CONCLUSIONS OF LAW

I

Transmission and distribution lines of the nature installed by plaintiff are real property or improvements thereto within the meaning of the sales and use tax law and the cable installed by plaintiff as part of a transmission or distribution line is therefore an improvement to real property.

II

Revenue and Taxation Code section 6016.5 classifies transmission and distribution lines of the nature installed by plaintiff as real property.

III

The cable installed by plaintiff was an improvement on or to real property within the meaning of Revenue and Taxation Code section 6384.

IV

Sales tax or use tax is due on the gross receipts or sales price on any tangible personal property used by a contractor in improving real property for the United States government.

V

Plaintiff's installation of the transmission line was done for the United States government. Tax was therefore due on the amount of gross receipts paid for the tangible personal property used by plaintiff in making the installation.

VI

Plaintiff is entitled to no refund of sales or use tax paid to defendant by reason of its use of tangible personal property in installing the transmission and distribution lines.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: JUNE 3, 1974.

/s/ Delbert E. Wong
DELBERT E. WONG
Judge Presiding

APPENDIX C

In the Court of Appeal, Second Appellate District, State of California, Division One.

Chula Vista Electric Company, a corporation, Plaintiff and Appellant, vs. The State Board of Equalization of the State of California, Defendant and Respondent.

APPELLANT'S PETITION FOR REHEARING

To the Presiding Justice and to the Associate Justices of the Court of Appeal of the State of California, Second Appellate District, Division One:

Appellant Chula Vista Electric Company petitions for a rehearing to reconsider the decision in this Court in this action filed on December 3, 1975.

II

THE OPINION IS IN ERROR IN HOLDING THAT THE ELECTRICAL INSTALLATIONS HERE IN QUESTION ARE "FIXTURES", BUT REFUSES TO PERMIT EXEMPTION FOR TAX AS A SALE TO A TAX EXEMPT ENTITY PURSUANT TO THE HOLDING OF THIS COURT IN *HONEYWELL INC. V. STATE BOARD OF EQUALIZATION* 48 CAL.APP. 3RD 897 AND *GENERAL ELECTRIC CO. V. STATE BOARD OF EQUALIZATION* (1952) 11 CAL.APP.2D 180.

The Court asserts in its opinion, on page 6, last line, that Chula Vista's installation is a fixture within the meaning of Title 18, Section 1615 of the Administrative Code. It would follow that if the item is described

as a fixture under Section 1615 it must also follow the same definition as a fixture set out in Section 1521, Title 18 of the Administrative Code. The Court further states that Appellant's reliance upon *Honeywell Inc. v. State Board of Equalization* 48 Cal.App.3rd 897 (122 Cal.Rep. 237) is misplaced. The attention of the Court is directed to a portion of the opinion in the *Honeywell* case (supra) which states as follows:

> "For over forty years it has been the law of California that when the manufacturer of tangible personal property sells such property at retail, such sale is subject to sales tax even though such manufacturer may also install such tangible personal property in real property, when such tangible personal property may be properly classified as 'fixtures'. When a manufacturer of a fixture contracts to sell and install the fixture, the problem is not a legal problem of taxability, it is merely an accounting problem to determine what portion of the total contract price is attributable to the tangible personal property (fixture) and what portion is attributable to the labor and service of installing it. If a retail merchant sells a portable air conditioner which is clearly subject to sales tax, such sale does not become nontaxable merely because the merchant delivers it to his customer's home and 'plugs' it into the electric outlet to make certain that it operates. But Honeywell in effect argues that this analogy is not accurate because in the case at bar *all* of its 'control devices' became a part of the realty and were not 'fixtures'. Board and the trial court, based on substantial evidence, found otherwise. . . ."

> ". . . What Honeywell is actually doing is questioning the validity of Board's basic approach of distinguishing between fixtures and materials which are incorporated in and become a permanent part of the real property. . . ."

In that case the Court cited the matter of *General Electric Company v. State Board of Equalization,* 11 Cal.App. 2nd 180, which held that a fixture installation was a sale of tangible personal property and in the instant matter such a sale would have resulted in Chula Vista having no liability for tax whatsoever. The attention of the Court is further directed to a reference relating to Section 6384 of the Revenue and Taxation Code. For purposes of this argument, the attention of this Court is directed to the plastic nature of State Board's actions which, if approved by this Court, would permit the State to recover a tax designed as reimbursable and not a burden on the seller from all persons other than those doing business with the United States Government. For the purposes of additional revenue the Board would impose a non-reimbursable tax on a person doing business with the United States Government solely because the United States Government is not subject to the imposition of an excise tax such as a state sales or use tax, and will not permit or pay a reimbursement to any person selling personal property to it irrespective as to whether the same is furnished in its tangible form or otherwise installed.

The attention of the Court is directed to a recent United States Supreme Court opinion, *Phillips Chemical*

Co. v. Dumas Independent School District, 361 U.S. 376, 80 S.Ct. 474, 4 L.Ed(2d) 384, which has condemned discrimination, saying at page 481 of the opinion as reported in the Supreme Court Reporter:

> "None of these arguments urged in support of the Texas Classification, seems adequate to justify what appears to be so substantial and transparent a discrimination against the Government and its lessees. Herein, Phillips is taxed under Article 5248 on the full value of the real property which it leases from the Federal Government, while businesses with similar leases using exempt property owned by the State and its political subdivisions, are not taxed on their leaseholds at all. The differences between the two classes, at least when the Government's interests are weighed in the balance, seem too impalpable to warrant such a gross differentiation. It follows that *Article 5248 as applied in this case, discriminates unconstitutionally against the United States and its lessee.* As we had occasion to state, quite recently, it still remains true, as it has from the time of *M'Culloch vs. Maryland,* 4 Wheat 316, 4 L.Ed. 579, that *a state tax may not discriminate against the Government or those with whom it deals.* (Citations) Therefore, this tax may not be exacted." (Emphases added.)

Treatment of all persons must be uniform and gross discrimination is present when any person is held liable for a tax only because he sells his property installed for the use of the United States Government.

APPENDIX D

Petition for Hearing

In the Supreme Court of the State of California.

Chula Vista Electric Company, a corporation, Plaintiff and Appellant, vs. The State Board of Equalization of the State of California, Defendant and Respondent. 2nd Civil No. 45454.

I
WHY A HEARING SHOULD BE GRANTED BY THIS COURT

A decision of this Honorable Court is essential in this case for the following reasons as authorized by Rule 29:

1. Important questions of law are involved herein, the settlement of which is essential. Specifically:

> (a) Section 6384 of the California Revenue and Taxation Code is unconstitutional because it discriminates against the United States Government and the persons with whom it deals in violation of the doctrine of federal sovereignty as implemented by Section 107 of Title IV of United States Code Annotated. It is contrary to the law established by the United States Supreme Court in the cases of *Phillips Chemical Co. vs. Dumas Independent School District* (1960), 361 U.S. 376, 80 S.Ct. 474, and *Moses Lake Homes, Inc. vs. Grant County* (1961), 365 U.S. 744, 81 S.Ct. 870.
>
> (b) Section 6384 of the California Revenue and Taxation Code and Section 1615 of the Cali-

fornia Administrative Code as interpreted and applied by the Court of Appeal are unconstitutional as constituting an invidious, arbitrary and capricious classification and discrimination against the federal government and those with whom it deals, contrary to the rule established in the cases of *Phillips Chemical Co. vs. Dumas Independent School District* and *Moses Lake Homes, Inc. vs. Grant County,* cited supra.

2. Section 6016.5 of the Revenue and Taxation Code is unconstitutionally vague and uncertain as to what is meant or intended to be included in an electrical transmission line or, alternatively, the Court of Appeal's holding that the cable installed by Petitioner is not exempt under Section 6016.5, contrary to law.